

(21,156.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 151.

JOHN E. SWANGER, SECRETARY OF STATE OF THE
STATE OF MISSOURI, APPELLANT,

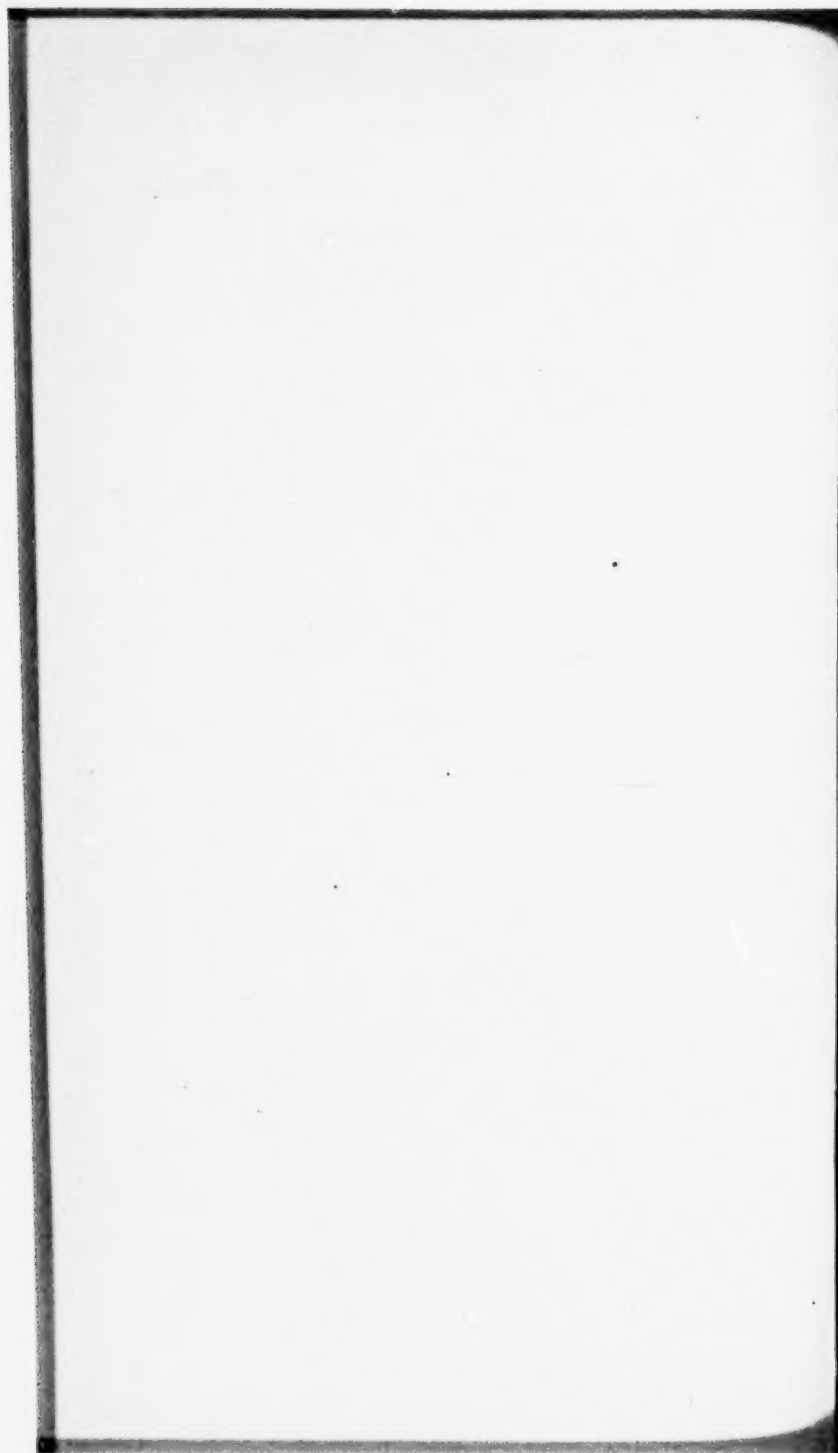
vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

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a In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3242.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

UNITED STATES OF AMERICA, ss:

Citation on Appeal.

To The Atchison, Topeka and Santa Fe Railway Co. and Thomas R. Morrow, its attorneys:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia, on the 2nd day of March, A. D. 1908, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the Circuit Court of the United States for the Western Division of the Western District of Missouri, from a final decree signed, filed and entered on the 31st day of January, 1908, in that certain suit, being in equity No. 3242, wherein you are the complainant and appellee and John E. Swanger, Secretary of State of the State of Missouri, is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

b Witness the Honorable Smith McPherson, United States District Judge for the Southern District of Iowa, presiding in the Circuit Court of the Eighth Judicial Circuit, this 31st day of January, 1908, and of the Independence of the United States the One Hundredth and Thirty Second.

SMITH MCPHERSON,
*United States Judge Presiding
in the Circuit Court.*

Service of a copy of the within citation is hereby acknowledged this 31st day of January, 1908.

Copy received Jan'y 31/08.

THOMAS R. MORROW,
Sol. for A., T. & S. F. Ry. Co.

c [Endorsed:] No. 3242. In Equity. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, vs. John E. Swanger, Secretary of State of the State of Missouri, Defendant. Citation on Appeal. Filed Jan'y 31, 1908. Adelaide Utter, Clerk.

1 UNITED STATES OF AMERICA, *set*:

Be it remembered, that heretofore, to wit, on the 16th day of September, 1907, a Bill of Complaint was filed in the office of the Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri in the case wherein The Atchison Topeka & Santa Fe Railway Company is Complainant, and John E. Swanger, Secretary of State of the State of Missouri, is Defendant.

Said Bill of Complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. In Equity.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Missouri:

The Atchison, Topeka & Santa Fe Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Kansas, and a citizen and resident of said State, brings this its bill against John E. Swanger, Secretary of State of the State of Missouri and a citizen and resident of Sullivan County and State of Missouri, and the Western District thereof, and thereupon complains and avers:

I.

Your orator states that it is now, and at the time of the commencement of this suit was, a corporation duly created, organized and existing under and by virtue and authority of the laws of the State of Kansas, and a resident and citizen of said State, and a non-resident of the State of Missouri; that the defendant John R. Swanger is now, and at the time of the commencement of this suit
2 was, a citizen and resident of the County of Sullivan in the State of Missouri, and at all said times a resident and inhabitant of the Western District of Missouri.

II.

Your orator further states that this suit is an action of a civil nature; that the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of Five Thousand Dollars (\$5,000.00) and further states that this cause arises under the Constitution and laws of the United States as hereinafter more particularly shown, and that the controversy herein involved is wholly between citizens of different states as aforesaid.

III.

Your orator further avers that long prior hereto, and prior to March 13, 1907 and June 14, 1907 your orator had built its line of railway and acquired its railway property in the State of Missouri, and became qualified to do business in said State, and that, in pursuance of said qualification and right, and under the laws of said State, the Secretary of State of said State of Missouri issued to your orator a certificate of authority to do business in said State of Missouri, which certificate is still in force and effect.

IV.

Your orator further avers that said defendant, John E. Swanger is now and was at the time of the commencement of this suit, the duly elected, qualified and acting Secretary of State of the State of Missouri.

V.

Your orator further avers that it is a railroad corporation and is now and for a long time prior hereto and prior to March 13th, 1907 has been, the owner and operator of a line of railway extending from the city of Chicago, Illinois, to the Pacific seaboard in the State of California and that it owns and operates now and for a long period of time prior to March 13th, 1907, has continuously owned and operated a line of railway extending from the city of Chicago in the State of Illinois, to and through the States of Iowa, Missouri, Kansas, Colorado, Texas and California, and the territories of Oklahoma, Indian Territory, New Mexico and Arizona; that your orator is now and for a long time prior hereto and prior to said March 13th 1907 has been engaged in the business of a common carrier of freight and passengers, both state and interstate over its said line of railroad; that for many years last past and prior hereto, your orator has owned and operated in carrying on its said business as a common carrier over its said line of railroad and in transporting both state and interstate business over the same within the State of Missouri, the following lines of railway, branch lines of railway or tracks within the State of Missouri, viz:

(a) The main line of your orator's said railroad entering the State of Missouri, and crossing the dividing line between the states of Kansas and Missouri, west of the present Union Depot 1140 feet south of the northwest corner of the Southwest quarter of Section Seven (7) Township Forty nine (49) Range Thirty-three (33) west to the point of connection with the tracks of said Union Depot, .19 of a mile west of the said Union Depot a distance of 1.18 miles; thence to said Union Depot; thence to Big Blue Junction at Sheffield, in the County of Jackson, in the State of Missouri, running, however, over 6.46 miles of tracks belonging to the Kansas City Belt Railway Company; thence from said Big Blue Junction to Dumas, in the County of Clark in the State of Missouri, where its line crossed the Des Moines River, passing from Missouri into Iowa, and passing

through the counties of Jackson, Ray, Carroll, Chariton, Linn, Macon, Adair, Knox, Scotland and Clark in said State of Missouri with a total length of main line track of 195.36 miles in said State of Missouri hereinafter referred to as your orator's main line of railway.

(b) A branch line running from North Lexington, in the County of Lafayette in the State of Missouri, to St. Joseph, in the County of Buchanan, in the State of Missouri, a distance of 76.49 miles, said branch passing through the counties of Ray, Clay, Clinton and Buchanan, in the State of Missouri.

4 (c) .9 of a mile of railroad in Buchanan County, Missouri, on the line between St. Joseph, Missouri, and Atchison, Kansas, and 20.8 miles of branch lines operated but not owned by it, and also 1.27 miles of second track.

(d) 6.46 miles of track of The Kansas City Belt Railway Company eastward from the Union Depot at Kansas City, Missouri, to Big Blue Junction at Sheffield, Jackson County, Missouri, over which your orator has trackage rights by an agreement with said Belt Railway Company.

VI.

Your orator further states that its main line of railway hereinbefore mentioned was originally constructed in or about the years 1886 or 1887, by the Chicago, Santa Fe & California Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Illinois, and that said line of railway was so constructed, owned, maintained and operated by said Illinois corporation long prior to the year 1891.

Your orator further states that its said lines of railway in the State of Missouri continue on into other States from Kansas City, St. Joseph and Dumas, and connect with various other railways running into various other States and Territories, forming numerous arteries for interstate commerce.

VII.

Your orator further states that its said branch line from North Lexington to St. Joseph, Missouri, hereinbefore referred to, was originally constructed, owned and operated by the St. Joseph and St. Louis Railroad Company, a corporation of Missouri, and thereafter sold to the St. Joseph, St. Louis & Santa Fe Railway Company, a corporation of Missouri, on January 30, 1888; The Atchison Topeka & Santa Fe Railroad Company, a railroad corporation duly organized and existing under the laws of the State of Kansas, and the immediate predecessor of this complainant, obtained and secured the practical ownership and the right to operate said

5 branch line on or about the years 1886 or 1887, or prior thereto, and continued to so operate said line until the sale thereof as hereinafter set forth.

VIII.

Your orator further states that the trackage rights in Buchanan

County, Missouri, hereinbefore referred to, were obtained by said The Atchison Topeka & Santa Fe Railroad Company a short time prior to or at the time of the construction of said main line of railway in said State of Missouri.

IX.

Your orator further states that the trackage rights over the line of The Kansas City Belt Railway Company hereinbefore referred to, were obtained by said Illinois corporation and Atchison, Topeka & Santa Fe Railroad Company on the 31st day of May, 1888.

X.

Your orator further states that The Atchison, Topeka and Santa Fe Railroad Company, a corporation duly created and existing under the laws of Kansas, at the time of the construction of the line of railway of the Chicago, Santa Fe & California Railway Company through the State of Missouri, as aforesaid, owned and operated a line of railway in the State of Kansas and other states, and that its said line of railway had been projected to, built, constructed and operated to the line of the state of Missouri at Kansas City, and that the line of railway of said Kansas corporation and the line of said Illinois corporation joined at the state line between the states of Missouri and Kansas, and formed a continuous line of railway extending in an easterly and westerly direction from said state line.

XI.

Your orator further states that all of said railway property hereinbefore referred to of the Chicago, Santa Fe & California Railway Company, in the State of Missouri, together with all its rights, privileges, grants, franchises, immunities and advantages, were subjected to and governed by a mortgage made, executed and delivered by it long prior to October 15, 1889; that prior to said last mentioned date, said Chicago, Santa Fe and California Railway Company had issued a large number of bonds secured by said mortgage, all of which at the time of their issue, as well as all the stock of said Chicago, Santa Fe and California Railway Company at the time of its issue, was paid for and became the property of said The Atchison, Topeka and Santa Fe Railroad Company, a corporation of the State of Kansas aforesaid, and so remained until the foreclosure of its mortgage as hereinafter mentioned; that said The Atchison, Topeka and Santa Fe Railroad Company by such method, and by and through the said Chicago, Santa Fe & California Railway Company as a constructing agency, and having previously built its line of railroad to the boundary line between the states of Kansas and Missouri, as aforesaid, and undertook to, and did, extend its line of railway into and through the adjoining state of Missouri, the said lines of road in each of the states of Kansas and Missouri forming a continuous line and connected at a point on said state line, as aforesaid; that said The Atchison Topeka and Santa Fe Railroad Com-

pany was at all times the owner of said Chicago, Santa Fe and California Railway Company, and all of its property of every kind.

Your orator further shows that said The Atchison Topeka and Santa Fe Railroad Company, the predecessor of your orator, on October 15, 1889, made, executed and delivered to the Union Trust Company, of New York, as a trustee, its certain mortgage covering all of its property wherever situated, and all of its rights, privileges, grants, franchises, immunities and advantages, and all of said capital stock and bonds of said Chicago, Santa Fe and California Railway Company; that thereafter said mortgage of said The Atchison Topeka and Santa Fe Railway Company was duly foreclosed by decree of the proper court, dated on or about August 27, 1895; that under and pursuant to said decree there was sold and acquired through proper conveyances, by your orator, on December 10, 1895, all the

7 property, appurtenances, franchises, rights, grants, immunities, benefits and advantages covered by said Mortgage including said stock and bonds of said Chicago, Santa Fe and California Railway Company by reason of which this applicant became then and thereby the owner of all said railroad property in the state of Missouri theretofore constructed and owned by said Chicago Santa Fe and California Railway Company, or in its name, and your orator has succeeded to all the rights, privileges, immunities, benefits and advantages formerly belonging to and enjoyed by said Chicago, Santa Fe & California Railway Company, and has ever since owned and operated the same, by reason of all of which your orator is entitled to operate said railway in the state of Missouri under the statutes of said state in such cases made and provided.

XII.

Your orator further states that since the construction of its lines of railway in the state of Missouri as aforesaid, its predecessor and your orator have continuously owned and operated said lines of railway, and that since the 25th day of August, 1895, as aforesaid, your orator has owned and operated said lines of railway as the successors of its said predecessors.

XIII.

Your orator further states that long prior to the construction of your orator's lines of railway through this state by its predecessors as aforesaid, to whose property, rights, privileges and immunities your orator has succeeded, the statutes of this state imposed no restrictions upon foreign corporations of like kind and nature with the Chicago, Santa Fe and California Railway Company, as aforesaid, but under the statutes as they then existed, and for a long time prior thereto, said railway corporation was authorized and invited by the laws of the state of Missouri to construct, own maintain and operate its railway property in and through the state of Missouri, and to make trackage contracts or agreements with other railway companies, whereby the right to use their tracks might be obtained.

8 Your orator further states that the General Assembly of Missouri in the year 1870, by an Act of the Legislature ap-

proved March 24, 1870, extended the right to foreign railway companies organized and existing under the laws of an adjoining state, to extend, construct, maintain and operate their railroads into and through the state of Missouri, and that thereafter by the Act of the Legislature approved March 26, 1881, said statute was further amended by striking out the words "and adjoining" and inserting in lieu thereof the word "any," so that the privileges of said statute were extended to railway companies organized under the law of any state, and that the line of railway of your orator's predecessor, the Chicago, Santa Fe & California Railway Company was built and constructed subsequent to the year 1881.

XIV.

Your orator further states that at the time, and for a long time prior thereto, of the construction of your orator's line of railway in this state by its predecessors, under the statutes of this state as they then existed, and for a long time prior thereto, said railway corporation was authorized and invited by the laws of the state of Missouri, to construct, own, maintain and operate its railway property through the state of Missouri, and that the statutes of said state imposed no restrictions upon foreign corporations of like kind and nature with the Chicago, Santa Fe and California Railway Company, aforesaid, other than those imposed upon domestic corporations, but subjected them to like duties, obligations and liabilities under the law; that your orator availed itself of the rights, privileges and immunities therein guaranteed, and accepted said invitation, and in pursuance thereof did so construct, maintain, operate and own its said railway property; and that your orator and its predecessors have expended large sums of money; and that said property has gradually increased in value until it is now of the value of many millions of dollars and

9 its said main line and Branch is now assessed by the state of Missouri for the purpose of taxation in the sum of Five Million, Thirty Thousand Four Hundred and Four and 27/100 Dollars. And your orator alleges that, by reason of the premises, the state of Missouri then and there entered into a valid, binding and subsisting contract with your orator, whereby said state of Missouri guaranteed to your orator all the rights, privileges and immunities granted and vouchsafed in the constitution and laws of the state of Missouri, upon the same basis and to an extent identical with the rights, privileges and immunities given thereby to railway corporations of the state of Missouri; and said State of Missouri then and there agreed by and with your orator that it would not thereafter subject it to greater or different obligations or restrictions than imposed upon railway corporations of the State of Missouri; that it would not give to railway corporations of the state of Missouri greater, other or different privileges than vouchsafed those of other states coming into its territory under its invitations and laws, as aforesaid; and your orator and its predecessors agreed and undertook to construct, acquire, maintain and operate the aforesaid lines of railway within the State of Missouri, and to thereby engage in state and interstate business as a common carrier of freight and passengers within the

state of Missouri, and your orator further states that it and its predecessors did, in good faith and with the expenditure of many thousands of dollars, accept the said invitation, and the agreement of the said state of Missouri, and entered therein and constructed, built, acquired and maintained, and has continued to so maintain, its said property as aforesaid, devoted entirely to its business as a common carrier of freight and passengers, including not only the miles of railway heretofore set forth, but depots, station grounds, shops, warehouses terminals, rolling stock and other equipment necessary to the maintenance and operation of said lines of railway now located and maintained in said state of Missouri and assessed by the State of Missouri in the value aforesaid.

10

XV.

Your orator further states that long subsequent to the construction of the railway property hereinbefore referred to, and long after the same had been built, owned and operated by your orator's predecessors under the statutes of the state of Missouri, as then provided, the General Assembly of Missouri passed an act in the year 1891, approved April 21, 1891, requiring foreign corporations, or those created and existing under the laws of states other than Missouri, to qualify under the provisions of said statute by filing copies of the articles of association, and payment of fees as therein required.

Your orator further states that said act of 1891, expressly exempted from the requirements of said act and the payment of the fees therein required, railway companies which had theretofore built their lines of railway into or through the state of Iowa, and that by reason thereof your orator was exempted from said requirements, and that your orator's predecessors, and their successors, (including your orator) were exempted by said statute, and were then and there recognized as qualified to do business in the State of Missouri, and that their qualification theretofore existing was then and there recognized and continued, and *there* then and there became a valid and binding contract and agreement between the State of Missouri and your orator, that said State of Missouri did and would place and keep your orator upon an equality with its domestic corporations of like kind and character and give to your orator equal rights, privileges and immunities with its domestic corporations, and not subject it to any greater, other or different restrictions than imposed upon said domestic corporations.

XVI.

Your orator further states that the Legislature of the state of Missouri attempted to enact and promulgate as a law of the state of Missouri, an act of the legislature approved March 13, 1907, which is in words and figures as follows, to-wit:

11 Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of

any other state, territory or country, and doing business as a carrier of freight or passengers from one point in this state, to another point in this state, under the laws of this state, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority, to, or suffering or allowing any such corporation to enter or to do business in this state, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this state to another point in this state shall forthwith be revoked by the secretary of state, and its right to do such business shall cease, and the secretary of state shall publish such revocation in some newspaper of large and general circulation in the state, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this state to another point in this state or to do business as a carrier of passengers or freight of any kind from one point in this state to another point in this state at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this state to a point without this state, or from a point without the state to a point within this state, or from making what are known as interstate shipments and transportation.

12 SEC. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point in this state to another point in this state, without a license, permit or certificate of authority therefor first had and obtained from the state of Missouri,—to be issued by the secretary of state,—or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this state to another point in this state, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the state of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suit to be brought therefor in any court of competent jurisdiction by the attorney-general, or the prosecuting attorney of any county in the state in which such offense shall have been committed; and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the attorney-general or any prosecuting attorney, to enforce or carry out the provisions of this act.

SEC. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed.

Approved March 13, 1907.

Your orator further states that in and by Section 1 of said act, it is pretended and attempted to be made the duty of the Secretary of State to revoke the license, permit or certificate of authority of any railway company instituting a suit in the federal court or removing a cause from a state court to the federal court.

XVII.

Your orator further states that under the Constitution and the statutes of the United States in such cases made and provided, it expects to and will on September 16, 1907, in the Circuit Court of Macon County, Missouri, file petitions and bonds for removal in the causes of Walter H. Green v. The Atchison Topeka and Santa Fe

13 Railway Company, and Jeanette Jane Lawler v. The Atchison Topeka and Santa Fe Railway Company, returnable on said date, and requiring defendant to answer or plead on said date, on the ground of diversity of citizenship, and is intending to and will remove said causes from said State Court to the proper federal court under the statutes in such cases made and provided; that said suit of Jeanette Jane Lawler against your orator, as aforesaid, is a suit of a civil nature, wherein the plaintiff therein is seeking to recover damages in the sum of Ten Thousand Dollars, together with costs of suit, against your orator as defendant, for and on account of the alleged death of her alleged husband Joseph Lawler, under the Statutes of Missouri, alleged to have been negligently caused by one of the trains of your Orator, at Ethel, Missouri, by striking and killing her said alleged husband, and said suit is an action between citizens of different states, being an action between said Jeanette Jane Lawler, as plaintiff, who, at the time of the commencement of said suit and at the time of the filing of the petition and bond for removal therein was, and now is, a citizen and resident of the State of Missouri, and your orator, as defendant, which, at the time of the commencement of said suit, and at the time of filing its said petition and bond for removal therein was, and is now, a citizen and resident of the State of Kansas, being a corporation duly created, organized and existing under and by virtue of the laws of said State of Kansas; that said suit of Walter H. Green against your orator, as aforesaid, is a suit of a civil nature, wherein the plaintiff therein is seeking to recover damages in the sum of Twenty-five Thousand Dollars, together with costs of suit, against your orator as defendant, for and on account of alleged personal injuries received by said Walter H. Green, while alleged to have been in the employment of your orator as a fireman and alleged to have been then and there in the discharge of his duties as such, and alleged to have been injured by being caught and struck by a mail crane near defendant's track, at the town of Gorin on defendant's line, alleged to have been negligently and carelessly set too close to your orator's track, by reason whereof plaintiff received his alleged injuries, and said suit is an action between citizens of different

14 States being an action between said Walter H. Green, as plaintiff, who, at the time of the commencement of said suit,

and at the time of the filing of the petition and bond for removal therein was, and now is, a citizen and resident of the State of Missouri, and your orator as defendant, which, at the time of the commencement of said suit, and at the time of the filing of its said petition and bond for removal therein was, and now is, a citizen and resident of the State of Kansas, being a corporation duly created, organized and existing under and by virtue of the laws of said State of Kansas; and your orator further states that there are numerous other cases being brought against it in the state courts of Missouri in which the requisite amount and diversity of citizenship exists for its removing said causes, and that it is the intention of your orator to remove all of said cases whenever and wherever brought against it in the state courts.

XVIII.

Your orator further states that defendant John E. Swanger as Secretary of the State of Missouri, pretending to act under and by virtue of the authority of the act of the legislature approved March 13, 1907, hereinbefore set forth, as such secretary of the State of Missouri, proposes, is threatening to, and will, unless enjoined by this Honorable Court, take such steps as provided in said act last aforesaid to forthwith revoke and cancel the certificate of authority of your orator to do business in the State of Missouri, and is threatening to, and will, publish such revocation in some newspaper of large and general circulation in the State of Missouri, and by such pretended revocation deny the right of your orator to carry freight and passengers from one point in this state to another point in this state, or to do business as a carrier of passengers or freight of any kind, from one point in this state to another, within five years from the time of such pretended revocation, should your orator file this, its bill of complaint before this Honorable Court, the same being a suit and proceeding instituted in the Federal Court of the United States against said defendant, a citizen of the State of Kansas, and should your orator remove, or attempt to remove said causes from the Circuit Court of Macon County, Missouri, as aforesaid, or other cases which shall be brought within the state courts of Missouri against your orator and otherwise removable.

XIX.

Your orator further states to the court that acting under and by virtue of, and fully within the rights and privileges vouchsafed and guaranteed unto your orator by the Constitution and laws of the United States, it hereby filed this its bill before this Honorable Court, and has filed said petitions and bonds for removal aforesaid, and will continue to file other and similar petitions and bonds for removal of cases from the courts of the State of Missouri to the proper courts of the United States, as occasion may arise therefor, under the Constitution and laws of the United States and the Constitution of the state of Missouri; and that said defendant, unless enjoined herein by this Honorable Court, will, so far as in his power lies, revoke and cancel all authority of your orator to do business in Missouri, and destroy, take away and deprive your orator of its right,

franchise and privilege to carry passengers or freight between points in the state of Missouri, deprive your orator of the use and benefit of its property permanently devoted to the purpose of its said railroad under the invitation and contract of the State of Missouri, as aforesaid, and will deprive your orator of its property without due process of law, and will deny to your orator the equal protection of the laws under the Constitution and laws of the United States and under the Constitution and laws of the State of Missouri.

XX.

Your orator further states that said act of the Legislature of Missouri, approved March 13, 1907, is void and unconstitutional, unlawful, unjust, oppressive, discriminative, confiscatory, null and void and in contravention of the Constitution of the United States and of the State of Missouri, and that said John E. Swanger, as Secretary of State of the State of Missouri or otherwise, under the provisions of said statute, has no power right or authority in
 16 pursuance thereof to revoke, or attempt to revoke, or cancel your orator's authority to do business in the State of Missouri.

Your orator further states that said act of the Legislature is unconstitutional and void for the following reasons and upon the following grounds, to-wit:

First. Said Act is unconstitutional and void and contrary to and violative of Section Two (2) of Article III of the Constitution of the United States, which provides that the judicial power of the United States shall extend to all cases, in law and equity, arising under the Constitution and laws of the United States, made under authority of said Constitution, and all such cases between citizens of different States, in that said Act professedly, expressly and directly and indirectly attempts to defeat the jurisdiction of the Courts of the United States, and deprive said courts of cognizance and jurisdiction of, cases, matters and controversies arising under the Constitution and laws of the said United States, and of cases and controversies between citizens of different States.

Second. Said Act is unconstitutional and void and in contravention of Section Ten (10) of Article I of the Constitution of the United States, which provides that no State shall pass any law violating the obligation of contracts, in that said Act is pretending and attempting to confer upon the defendant herein, John E. Swanger, as Secretary of State, the power to revoke, cancel or annul your Orator's right and authority to carry on business as a common carrier between points within the State of Missouri, and to thus deprive your orator of the use of its property, and thereby to forbid the exercise of its rights, privileges and immunities granted and vouchsafed to it by the Constitution and laws of the United States and the Constitution and laws of the State of Missouri, and impairs the obligation of a contract between the State of Missouri and your orator, wherein and whereby, when your orator began and qualified to do business within the State of Missouri upon the same basis and subject to the same laws and like conditions of corporation-
 17 formed and created under the laws of Missouri, the giving of such invitation as extended by the Constitution and laws of

Missouri, and the acceptance thereof by your orator and its predecessors, and the entering of the State, and building, constructing, owning, maintaining and operating its said line of railway and railway property, it was contracted and agreed by and between the State of Missouri and your orator's predecessors and your orator, that, for the term of its right to do business in the State of Missouri, said State would not impose restrictions and conditions upon your orator different from those of domestic corporations, and in and by said Act the State of Missouri attempts to deny to your orator the right to institute causes in the Federal Courts and to remove causes from the State courts to Federal courts, all of which is permitted without restraint or restriction to domestic corporations organized under and by virtue of the laws of the State of Missouri, and is further in contravention and violation of section 15, Article II of the Constitution of the State of Missouri, which provides that no law impairing the obligation of a contract shall be passed by the General Assembly, and Section 53, Article IV of the Constitution of the State of Missouri, which provides that the General Assembly shall not pass any local or special law granting to any corporation any special or exclusive right, privilege or immunity, in that it impairs a contract between the State of Missouri and your orator, as aforesaid, and in that it discriminates between your orators and corporations of the State of Missouri, by permitting said corporations to institute suits in and remove suits from State courts to the Federal courts.

Third. Said Act is unconstitutional and void, and is in contravention and violation of the Fourteenth Amendment to the Constitution of the United States, in that it unjustly discriminates against your orator and in favor of domestic corporations of like character, and deprives your orator of due process of law, denies it the rights vouchsafed and protected by the Constitution and Laws of the United States, takes its property and rights without due process of law, and denies to your orator the equal protection of the laws, and for like reasons is in contravention and violation of Section 30, Article 18 II, of the Constitution of the State of Missouri.

Fourth. Said Act is unconstitutional and void, and is in contravention and violation of the Fourteenth Amendment to the Constitution of the United States in that it empowers and authorizes the Secretary of the State of Missouri to pass upon the question as to whether or not suits are begun in the Federal Courts or removed from the State courts to the Federal courts without the consent of the other party, and said Act makes the decision of said Secretary conclusive thereon, without any hearing in any court, or appeal to any court, and thereby deprives your orator of its property and property-rights without due process of law, and is likewise in contravention and violation of Section 30, Article 39 of the Constitution of the State of Missouri, for like reasons, and is furthermore in contravention and violation of Article III of the Constitution of Missouri, which divides the governmental powers into three distinct departments, the legislative executive and judicial, and forbids the delegation of the powers of the one department to another, in that said Act delegates judicial powers to said Secretary, a branch of the executive department of the Government of Missouri.

Fifth. Said Act is unconstitutional and void, and in contravention and violation of Section 2, Article III, of the Constitution of the United States and Section 28 of Article II, of the Constitution of the State of Missouri, in that in attempting to empower and authorize the defendant, John E. Swanger, to pass upon the question as to whether or not suits may have been removed from the State Courts to the Federal Courts without the consent of the other party, said Act denies your orator the right of trial by jury.

Sixth. Said Act is unconstitutional and void, because the afore-said lines of railway of your orator within the State of Missouri form the connecting links between its lines of railway in other states and territories, and it is necessary to conduct its business as a common carrier of freight and passengers between other states and territories over its said lines of railway within the State of Missouri, and while said Act purports to deny your orator the right to engage in
19 intra-state business only, yet the manifest purpose and necessary and direct result of the purported forfeiture by the defendant of your orator to do intra-state business between points within the State of Missouri would necessarily and as a direct and intended consequence unreasonably and directly interfere with the interstate business of your orator, and would impose an intolerable and prohibitive burden upon all of such interstate commerce so passing into, from or through the said State of Missouri over the lines of railway so maintained by your orator. The said Act, therefore, in attempting to empower and authorize the defendant as Secretary of State of the State of Missouri, to deny and take from your orator the right to carry on its business as a common carrier between points within the State of Missouri, is, therefore, contrary to and violative of Section Eight of Article I of the Constitution of the United States, which reserves to Congress the right and powers to regulate commerce with foreign nations and among the several States and with the Indian Tribes. And your orator submits that forasmuch as the Constitution of the United States and the laws passed in pursuance thereof, have committed to Congress and its authorized Commission the power to regulate commerce among the States and withdraws the same from every degree of interference on the part of any State or any State officials, the said Act of March 13, 1907, interfering therewith is repugnant to the Constitution of the United States and the laws passed in pursuance thereof, and is therefore null and void.

Seventh. Because said Act, unless its enforcement is enjoined herein, affecting as it would not only its intra-state but its interstate traffic within the State of Missouri, would so unreasonably reduce the annual gross income derived from the operation of your orator's lines of railway within the State of Missouri, as to become insufficient to permit your orator to operate its property in the State of Missouri without loss, all of which is contrary to and violative of the
20 provisions of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law, and guaranteeing to all persons the equal protection of the law.

Eighth. Because said Act purporting to give the defendant as Secretary of State of the State of Missouri, the right arbitrarily to deny your orator the right to do business between points within the State of Missouri, and thereby depriving your orator of the use of its property as a common carrier of freight and passengers for hire, is contrary to and violative of Section One of Article XIV of the Amendments to the Constitution of the United States, and of Section Thirty of Article II of the Constitution of the State of Missouri, which provide that no State shall deprive any person of property without due process of law, and that no person shall be deprived of property without due process of law.

Ninth. Because said Act, in denying your orator, under pain of heavy penalties, the right to remove a cause to the Federal Court which may be commenced in a State Court of Missouri, or the right to institute a proceeding in any Federal Court against any citizen of Missouri, thereby depriving your orator of a right to resort to the Courts of the land in an orderly manner, is contrary to and violative of Section One of Article XIV of the amendments to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Tenth. Because said Act, in denying to your orator, a foreign railway corporation being now and for many years last past lawfully and properly within the jurisdiction of the State of Missouri, the right of appealing to Federal Courts for the trial of its rights or the redress of its wrongs, such rights being freely and fully accorded to all domestic railway corporations of the State of Missouri, without condition or limitation, is contrary to and violative of Section One of Article XIV of the amendments to the Constitution of the United

21 States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Eleventh. Because said Act in denying to your orator the right to appeal to the Federal Courts for the trial of its rights or the redress of its wrongs except under the pain of heavy and prohibitive penalties is contrary to and violative of Section Ten of Article II of the Constitution of the State of Missouri, providing that the Courts of Justice shall be open to every person and certain remedy afforded for every injury to person or property, and that right and justice should be administered without sale, denial, or delay.

XVI.

Your orator further avers that, as hereinbefore alleged, said defendant, unless enjoined by this Honorable Court, threatens to and will proceed to attempt to cancel and revoke your orator's certificate or authority or right to do business in the State of Missouri, as attempted to be interdicted by said void and unconstitutional Act; and that your orator will be subjected to a multiplicity of vexatious suits, actions and proceedings, and that your orator has no adequate remedy at law, but, unless said defendant is restrained by this Honorable Court, your orator will suffer irreparable loss, and that your orator

has no adequate remedy except such as is cognizable in a court of equity above.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, your orator prays that the defendant John E. Swanger, as Secretary of State of the State of Missouri, his deputies, agents and successors in office, may be forever temporarily and permanently restrained from enforcing or attempting to enforce the provisions of said Act of March 13, 1907, and from revoking and cancelling or attempting to revoke and cancel your orator's certificate granting your orator the right to do business in the State of Missouri because of the removal of the suits hereinbefore referred to, or whenever your orator shall remove suits or proceedings to any Federal Court or bring suits or proceedings in

22 Federal Courts against any citizen of the State of Missouri and from attempting to enforce any and all the provisions of said Act as to your orator, and that said Act be declared unconstitutional, null and void, and not binding on your orator, and for such other, further and different relief as in equity may be just and equitable.

And your orator further prays that, in the meantime and until the hearing hereof, your orator may have a temporary restraining order embracing and including all of the relief herein prayed for, and such restraining order to continue in force until the termination of the hearing for a perpetual injunction and until the further order of this Court.

And may it please your Honors to grant unto your orator a writ of subpoena of the United States of America issuing out of and under the seal of this Honorable Court, directed to said John E. Swanger Secretary of State of the State of Missouri thereby commanding him on a day certain to be named and under a certain penalty personally to be and appear before this Honorable Court, and then and there full, true, direct and perfect answer to make to all and singular the premises, but not under oath, answer under oath being expressly waived, and to stand to, perform and abide by such order, direction and decree as may be made against him in the premises.

And your orator will ever pray.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
By THOMAS R. MORROW &
JAMES P. GILMORE,

Solicitors for Complainant.

JOHN M. FOX,
Of Counsel.

The United States of America, Western Division of the Western District of Missouri.

STATE OF MISSOURI,
County of Jackson, ss:

Thomas R. Morrow, upon his oath says that he is a solicitor for and agent of the above named complainant, and as such authorized

to, and does make this affidavit for and in behalf of said complainant,
 23 The Atchison, Topeka and Santa Fe Railway Company a
 corporation, in the absence of the president and other chief
 officer of said Company, from the State of Missouri, and fur-
 ther says that he has read the foregoing bill of complaint subscribed
 in behalf of said complainant, and knows the contents thereof, and
 that the same is true of his own knowledge, except as to the matters
 therein stated on information and belief, and as to those matters he
 believes it to be true.

THOMAS R. MORROW.

Subscribed and sworn to before me this 16th day of September,
 1907.

My commission expires June 8, 1909.

[SEAL.]

LYDIA COLLIER,

Notary Public, Jackson County, Missouri.

Thereupon a Writ of Subpœna was duly issued, served, returned
 and filed. Said Writ with the return of the Marshal is in words
 and figures as follows:

UNITED STATES OF AMERICA,

Western Division of the Western District of Missouri, set:

The President of the United States of America to John E. Swanger,
 Secretary of State of the State of Missouri, Greeting:

You are hereby commanded to be and appear at Rules, to be held
 at the office of the Clerk of the Circuit Court of the United States,
 for the Western Division of the Western District of Missouri, on the
 first Monday of October next, at Kansas City, then and there to an-
 swer the bill of complaint of The Atchison, Topeka & Santa Fe
 Railway Company, a corporation and citizen of the State of Kansas
 filed against you on the 16th day of September, A. D. 1907; hence
 fail not.

Witness The Honorable Melville W. Fuller, Chief Justice of the
 Supreme Court of the United States, the 16th day of September,
 1907.

24 Issued at office in Kansas City, in said District, under the
 seal of said Court, the day and year last aforesaid.

[SEAL.]

ADELAIDE UTTER,

Clerk of said Circuit Court.

Mem.—The defendant to enter his appearance in this suit in
 the Clerk's Office on or before the day at which the writ is return-
 able; otherwise the bill may be taken pro confesso.

ADELAIDE UTTER, *Clerk.*

UNITED STATES OF AMERICA,

Western Division of the Western District of Missouri, set:

I do hereby certify that I executed this writ by delivering a duly
 certified copy of same to John E. Swanger, Secretary of State at his
 office in Jefferson City, Missouri, on September 16th, 1907.

Done in the Central Division of the Western District of Missouri.

E. R. DURHAM,

U. S. Marshal, Western District of Missouri,

By H. C. MILLER, Deputy.

Marshal's Fees:

158 Miles travel at 6 cts.....	9.48
One Service at \$2.00.....	2.00

Total.....	\$11.48
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Thereupon, to wit, on the 16th day of September, 1907, the following Restraining Order was filed and entered of record:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri, Defendant.

25

Restraining Order.

Now, on this 16th day of September, 1907, comes The Atchison, Topeka and Santa Fe Railway Company, by its Solicitor, Thomas R. Morrow, and presents its verified Bill of Complaint herein, praying for an injunction temporarily and permanently restraining the defendant, John E. Swanger, as Secretary of State of the State of Missouri, his deputies, agents and successors in office, from enforcing or attempting to enforce the provisions of an Act of the Legislature of the State of Missouri, approved March 13th, 1907, providing for the revoking and cancelling of the license granting the right to foreign railway corporations to do business between points within the State of Missouri, whenever such a corporation shall remove suits or proceedings to any Federal Court or bring certain suits or proceedings to any Federal Court against any citizen of the State of Missouri; and for an order and decree declaring said Act of the Legislature of the State of Missouri, approved March 13th, 1907, to be unconstitutional, void and unenforceable, and not binding upon complainant, The Atchison, Topeka and Santa Fe Railway Company.

Upon reading the Bill of Complaint and after due consideration and the Court being fully advised in the premises, it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said application for the writ of injunction unless defendant is, pending such hearing, restrained as herein set forth, it is ordered that the application for the temporary injunction be, and it is hereby, set down for hearing before the United States Circuit Court at St. Joseph, Missouri, on Tuesday, October Eighth 1907, at 10 o'clock A. M. or as soon thereafter as said Court can hear the same. And it is further ordered that, in the meantime and until the further order of the Court, the defendant, John E. Swanger, as Secretary of State of the State of Missouri, his deputies, agents and successors in office, be, and

26 they are hereby, temporarily restrained from enforcing or attempting to enforce the provisions of said Act of March 13th, 1907, providing for the revoking and cancelling of the license granting the right to foreign railway companies to do business between points within the State of Missouri whenever such corporation shall remove suits or proceedings to any Federal Court or bring any suit or proceeding in any Federal Court against any citizen of the State of Missouri, or from revoking or cancelling or attempting to revoke or cancel, the Certificate of authority of the Complainant to do business in the State of Missouri, or from denying or attempting to deny said Complainant's right to do business in the State of Missouri on account of any alleged violation of said Act. It is further ordered that said restraining order shall become effective and binding upon the parties hereto only after it shall have been filed with the Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

It is further ordered that a copy of this order be forthwith served upon the defendant herein.

(Signed)

SMITH McPHERSON, *Judge.*

Thereupon a Certified Copy of said Restraining Order was duly issued, served, returned and filed. The Marshal's Return on the back of said copy is in words and figures as follows:

Marshal's Return.

UNITED STATES OF AMERICA,
Western District of Missouri, set:

I do hereby certify that I executed the within restraining order by delivering a duly certified copy of the same to John E. Swanger, Secretary of State at his office in Jefferson City, Missouri on September 16, 1907.

Done in the Western District of Missouri, and in the Central Division thereof.

E. R. DURHAM,
United States Marshal,
By H. C. MILLER, *Deputy.*

Marshal's fees:
1 service \$2.00.

27 Afterwards, to wit, on the 9th day of October, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

By consent of counsel and before filing of answer or other pleading it is ordered that complainant have permission to amend by in-

terlineation its Bill of Complainant herein by adding at the end of paragraph three thereof the following words "Are since the issuance of said certificate and upon the faith thereof your orator has laid out and expended many thousands of dollars in the improvement, extension and employment of its railroad property hereinafter more particularly described & located in the State of Missouri."

(Signed)

SMITH McPHERSON, *Judge*.

Consent is given to making the amendment as above stated.

JOHN KENNISH,
Att'y for Def't.

Afterwards, to wit, on said 9th day of October, A. D. 1907, the following Petition for leave to file Supplemental Bill was filed:

28 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. —.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Petition for Leave to File Supplemental Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The petition of The Atchison, Topeka and Santa Fe Railway Company, a corporation duly created and existing under and by virtue of the laws of the State of Kansas, respectfully shows that on or about the 16th day of September, 1907, your petitioner filed its bill of complaint in this Honorable Court against John E. Swanger, Secretary of State of the State of Missouri, for the purpose of enjoining and restraining him from enforcing the provisions of the Act of the Legislature of Missouri, approved March 13, 1907, relative to the removal of causes from State courts of Missouri to the proper Federal Courts, and bringing of suits by your petitioner and other foreign railway corporations in the proper Federal Courts, against any citizen of the State of Missouri, and praying that said defendant, John E. Swanger, as Secretary of State of the State of Missouri, his deputies, agents and successors in office may be forever temporarily and permanently restrained and enjoined from enforcing or attempting to enforce the provisions of said Act of March 13, 1907, and from revoking and cancelling, or attempting to revoke and cancel your petitioners' certificate and license granting your petitioner the right to do business in the State of Missouri because of the removal of suits or proceedings to any proper Federal Court, or when your petitioner as plaintiff or complainant brings suits or proceedings in the proper

29 Federal Courts against any citizen of the State of Missouri and from attempting to enforce any and all the provisions of said Act as to your petitioner, and that said Act be declared unconstitutional, null and void, and not binding on your petitioner, and for such other further and different relief as in equity may be just and equitable.

Your petitioner further shows that the said John E. Swanger, as Secretary of State of the State of Missouri, has been served with process, but no answer has yet been filed to said original Bill of Complaint. That after said original bill of complaint was filed, that is to say, on the 16th day of September, 1907, there were filed in the cases of Walter H. Green vs. The Atchison Topeka and Santa Fe Railway Company, and Jeanette Jane Lawler vs. The Atchinson Topeka and Santa Fe Railway Company, cases brought and pending in the Circuit Court of Macon County, Missouri, at Macon City, petitions and bonds for removal, and in each of them, said State Court, on the same date accepted and approved said petitions and bonds for removal, and each of them, and that said causes and each of them, were then and there ordered by said State Court to be removed to the proper Federal Court, to-wit the Circuit Court of the Northern Division of the Eastern District of Missouri, which said suits are referred to in paragraph XVII of the original bill of complaint herein and to which reference is here made.

Your petitioner further states that said facts supervened since the filing of the original bill of complaint herein, and that it is expedient and necessary to show said facts.

Your petitioner therefore prays that leave may be granted to it to file a supplemental bill herewith submitted against the defendant above named, alleging said facts, and making the same a part of the statement of the cause of action herein, and part of the allegations of bill of complaint in this suit with apt words charging said facts, and with such prayer for relief as may be proper, and for such other and further relief as may be meet and proper.

THOMAS R. MORROW,
JAMES P. GILMORE,

Solicitors for Complainant.

JOHN M. FOX,
Of Counsel.

30

Notice.

To John E. Swanger, Secretary of State or Herbert S. Hadley, Attorney General of the State of Missouri, representing said John E. Swanger, Secretary of State:

Please take notice that in the case of The Atchison Topeka and Santa Fe Railway Company, complainant, against John E. Swanger, Secretary of State of the State of Missouri, defendant, in equity, pending in the Circuit Court of the United States for the Western Division of the Western District of Missouri, said complainant will on the 8th day of October, 1907, at St. Joseph in the State of Missouri, present to the Honorable Smith McPherson, United States

District Judge and as such discharging the duties of Circuit Judge of the United States Court for the Western Division of the Western District of Missouri, the foregoing petition for leave to file in said cause a supplemental bill a copy of which is attached to the foregoing petition and notice.

THOMAS R. MORROW,
Solicitor for Complainant.

31 The supplemental bill filed herein on the 9th day of October, A. D. 1907, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. —.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri, Defendant.

Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Atchison, Topeka & Santa Fe Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Kansas, and a citizen and resident of said State, brings this its supplemental bill against John E. Swanger, Secretary of the State of Missouri and a citizen and resident of Sullivan County and State of Missouri and of the Western Division of the Western District thereof, and thereupon complains and avers:

I.

That on or about the 16th day of September, 1907, your orator exhibited its original bill of complaint in this Honorable Court, against John E. Swanger, the Secretary of the State of Missouri, the defendant in said original bill of complaint, and the defendant herein, thereby stating that a certain Act of the General Assembly, approved March 13, 1907, was being attempted to be enforced by the said defendant; that said act provided for the revoking and cancelling of your orator's certificate and license to do business in the State of Missouri, in the event it should remove any cases instituted in the State courts against it, to the proper Federal Courts, or as plaintiff or complainant bring or institute any suit in any Federal Court against any citizen of the State of Missouri, and allegations apt and pertinent thereto, in which your orator stated facts showing the unconstitutionality of said Act upon the facts and grounds therein in said Original

32

Bill, and prayed for an order of this Honorable Court, restraining and enjoining said defendant, temporarily, and until a further hearing of said cause, his deputies, agents and successors in office, from enforcing or attempting to enforce the provisions of said Act of March, 1907, and from revoking and cancelling, or attempting to revoke and cancel your orator's certificate granting your orator the right to do business in the State of Missouri because of the removal of certain suits referred to in said original bill of complaint, or whenever your orator should remove suits or proceedings to any Federal Court, or as plaintiff or complainant, bring suits or proceedings in Federal courts against any citizen of the State of Missouri, and from attempting to enforce any and all the provisions of said Act as to your orator, and praying that said act be declared unconstitutional, null and void, and not binding on your orator, and for such other, further and different relief as in equity may be just and equitable.

II.

Your orator further states that, in paragraph XVII of said original bill of complaint, your orator alleged, in effect, that it would on September 16, 1907, in the Circuit Court of Macon County, Missouri, file petitions and bonds for removal in the causes of Walter H. Green v. The Atchison, Topeka & Santa Fe Railway Company, and Jeanette Jane Lawler v. The Atchison, Topeka and Santa Fe Railway Company, returnable on said date, and would remove the same, and obtain orders therefor; that said suits were of a civil nature, involving in each instance more than two Thousand Dollars, exclusive of interest and costs, and between citizens of different States, and therein shown.

III.

Your orator further states that, on said 16th day of September 1907, it did so file said petitions and bonds for removal, as referred to in paragraph II hereof, and paragraph XVII of the original Bill of Complaint, and that said petitions in said causes, and the bonds for removal filed therewith, were, and each of them, 33 by said Circuit Court of Macon County, Missouri, accepted and approved, and said causes, and each of them, were then and there, by said Circuit Court, ordered removed to the proper Federal Court of the United States, to-wit, the Circuit Court of the United States for the Northern Division of the Eastern District of Missouri, and that the same now and from said date of September 16, 1907, stand removed from said State Court to said Federal Court, and that said cause of Walter H. Green v. The Atchison Topeka and Santa Fe Railway Company and Jeanette Jane Lawler v. The Atchison, Topeka and Santa Fe Railway Company, have been so removed, and that said fact of the removal of said causes has supervened since the filing of said original bill, and that by reason thereof there is danger of the said certificate and license of this complainant being attempted to be revoked by the defendant herein pretending

to act under the authority of said Act of the Legislature of the State of Missouri, unless he be enjoined and restrained by order of this court, and that such revocation is threatened by the defendant herein.

IV.

Your orator further states that subpoena has been issued and served in this cause, but answer has not yet been filed to said original bill of complaint.

May it please your Honors to grant to your orator, in addition to the writ of injunction or restraining order herein, a subpoena issuing out of this court in accordance with the equity practice directed to said defendant, on a day to be named therein, to appear in this court and to make answer unto all and singular the allegations of the supplemental bill of complaint herein, as well as said original bill of complaint, and to stand to, abide by and to do such other acts and things as are required by the principles of equity and good conscience.

And your orator will ever pray.

THOMAS R. MORROW,
JAMES P. GILMORE,
Solicitor for Complainant.

JOHN M. FOX,
Of Counsel.

34 THE UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri:

STATE OF MISSOURI,
County of Jackson, ss:

Thomas R. Morrow, upon his oath, says that he is a solicitor for and agent of the above named complainant, and as such, authorized to, and does make this affidavit for and in behalf of said complainant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, in the absence of the president and other chief officer of said company from the State of Missouri and further says that he has read the foregoing supplemental bill of complaint subscribed in behalf of said complainant, and knows the contents thereof, and that the same are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

THOMAS R. MORROW.

Subscribed and Sworn to before me this 8th day of October, 1907.

C. C. COLT,
Clerk U. S. Circuit Court.

35 Afterwards, to wit on the 9th day of October, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Upon proper cause shown & it appearing that due & proper notice of the presentation thereof has been given it is ordered that complainant have leave to file a supplemental bill in the above entitled cause.

(Signed)

SMITH McPHERSON, *Judge.*

36 Afterwards, to wit, on the 4th day of November 1907, the following Appearance was filed:

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

3242.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Complainant,
vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Appearance of Defendant.

To the Clerk:

I hereby enter my appearance as solicitor for defendant in the above entitled cause.

HERBERT S. HADLEY,
Solicitor for Defendant.

Afterwards, to wit, on the said 4th day of November, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3242.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Order.

It is hereby ordered by the Court that the restraining order here-

tofore made, issued and entered in this cause be, and the same is, hereby continued in full force and effect until the further order of this court.

37 (Signed)

SMITH McPHERSON.

Dated: Kansas City, Missouri, November 4, 1907.

Afterwards, to wit on the 30th day of November, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3242.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Complainant,
vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

The time for pleading on behalf of the defendant is, upon his application hereby extended to on or before the first Monday of February, 1908.

(Signed)

SMITH McPHERSON, *Judge.*

Afterwards, to wit, on the 11th day of January, 1908, a Motion for Temporary Injunction was filed. Said Motion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,

vs.

JOHN E. SWANGER, Secretary of State, Defendant.

38 Comes now The Atchison, Topeka and Santa Fe Railway Company, complainant in the above entitled cause, and moves the Court to grant a temporary injunction in accordance with the prayer of its bill of complaint filed herein.

THOMAS R. MORROW,
JAMES P. GILMORE,

*Attorneys for The Atchison, Topeka and
Santa Fe Railway Company.*

Afterwards, to wit, on the 31st day of January, 1908, a Demurrer was filed. Said Demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division
of the Western District of Missouri.

In Equity. No. 3242.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Demurrer of the Above Named Defendant to the Bill of Complainant.

The above named defendant, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's bill of complaint to be true in manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of demurrer sheweth:

First. That said complainant has not in said bill of complaint made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against defendant, or to any relief whatsoever.

Second. It appears upon the face of complainant's bill of complaint that complainant has an adequate remedy at law.

Third. It appears upon the face of complainant's bill of complaint that this court has no jurisdiction to hear and determine this cause, or to grant any relief therein whatsoever, for the reason that
39 said suit is in effect a suit against the State of Missouri within the meaning of the Eleventh Article of Amendment to the Constitution of the United States.

Fourth. It appears upon the face of complainant's bill of complaint that complainant is a railroad company organized under the laws of the State of Kansas, and that it has since the year 1875, and prior to the year 1907, consolidated, by purchase or otherwise, with a railroad company organized under the laws of the State of Missouri, and that by virtue of said consolidation it has secured all or a part of the lines of railroad in the State of Missouri now owned and operated by said complainant, and that, therefore, said complainant was not entitled, under the provisions of Section 18 and Section 21 of Article XII of the Constitution of Missouri, and Section 1060 of Chapter 12, Article II, Revised Statutes of Missouri, 1899, to remove any suit instituted against it in the courts of Missouri to the Federal courts, but that said complainant became and remained by virtue of said consolidation and the Constitution and statutes of the State of Missouri, subject to the jurisdiction of the courts of Missouri, as if said corporation had been organized under the laws of the State of Missouri.

Wherefore, and for divers other good causes of demurrer appearing in the complainant's bill of complaint, defendant demurs, thereto and demands the judgment of this court whether he shall be compelled to make any further or other answer to said bill of complaint,

and prays to be hence dismissed with the costs and charged in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General of the State of Missouri,
Counsel for Defendant.

Personally appeared before me, the undersigned Notary Public John E. Swanger, Secretary of State of the State of Missouri, defendant in the above entitled cause, and says that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

40

JOHN E. SWANGER.

Subscribed and sworn to before me this 30 day of January, A. D. 1908.

[SEAL.]

THOMAS S. REED,
Notary Public.

My Term expires March 7th, 1909.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HERBERT S. HADLEY,
Attorney General of the State of Missouri,
Counsel for Defendant.

Thereupon, to wit, on the said 31st day of January, 1908, the same being a day of the regular November term of said Court, a Decree was filed and entered of record. Said Decree is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3242.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Now on this day comes complainant by its solicitors, Thomas R. Morrow and James P. Gilmore, and also comes defendant by his solicitors, Herbert S. Hadley, John Kennish and Rush C. Lake. The Court grants and orders a temporary injunction as prayed, to which order defendant excepts. Thereupon defendant files herein his demurrer to the original and supplemental bills of complaint, which

demurrer is by the Court overruled, to which action of the Court in overruling said demurrer, defendant excepts.

Thereupon, defendant refused to plead further, and standing upon his said demurrer consented that this cause might be submitted for final hearing upon said original and supplemental bills, and this cause came on for hearing upon said original and supplemental bills, and by consent of counsel for complainant and defendant
41 being submitted thereon, and the Court having heard the arguments of counsel, and having read said original and supplemental bills, and being fully advised in the premises, finds the issues for the complainant and finds that the equity in the case is with the complainant and against the said John E. Swanger, Secretary of State of the State of Missouri, and that the statute of State of Missouri hereinafter referred to is unconstitutional and void, and that the complainant is entitled to the relief for which it prays in its said original and supplemental bills of complaint, and finds that the allegations of the original and supplemental bills are true, and that the complainant is entitled to injunction as prayed for.

Thereupon it is by the Court considered, ordered, adjudged and decreed that defendant, John E. Swanger, Secretary of State of the State of Missouri, his deputies, assistants, agents and successors in office, be and they are hereby permanently restrained and enjoined from enforcing, or attempting to enforce against this complainant, The Atchison, Topeka and Santa Fe Railway Company, the provisions of the act of March 13, 1907, of the legislature of the State of Missouri, set forth in said original bill of complaint, providing for the revoking and cancelling of the license granting the right to foreign railway companies to do business between points within the State of Missouri, because it has heretofore or may hereafter, remove cases from the courts of the State of Missouri to the courts of the United States, or whenever such corporation or company shall remove suits or proceedings to any court of the United States or bring any suit or proceeding in any court of the United States against any citizen of the State of Missouri; and from revoking or cancelling, or attempting to revoke or cancel the certificate of authority of complainant, The Atchison, Topeka and Santa Fe Railway Company to do business in the State of Missouri, and from denying or attempting to deny said complainant's right to do business in the State
of Missouri on account of any alleged violation of said act.

42 It is further ordered that complainant herein have and recover of and from the defendant its costs herein laid out and expended, and have execution therefor.

(Signed)

SMITH McPHERSON, *Judge.*

Dated at Kansas City, Missouri, this 31st day of January, 1908.

43 The Assignment of Errors filed herein on the 31st day of January, 1908, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division
of the Western District of Missouri.

In Equity. No. 3242.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Assignment of Errors.

The defendant prays an appeal from the final decree of this Court to the Supreme Court of the United States and assigns for error:

1st. That the court erred in overruling the demurrer to the bill.

2nd. The court erred in granting an injunction against the defendant, as prayed in the bill.

3rd. The court erred in decreeing the Act of the Legislature of the State of Missouri, approved March 13, 1907, and set out at length in complainant's bill, unconstitutional and void.

4th. The court erred in granting the temporary injunction against defendant.

5th. The court erred in granting a permanent injunction against defendant.

HERBERT S. HADLEY,

*Attorney General of the State of Missouri,
Counsel for Defendant.*

44 The Petition for Order allowing Appeal filed herein on the 31st day of January, 1908, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division
of the Western District of Missouri.

In Equity. No. 3242.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Petition for Order Allowing Appeal.

The above named defendant conceiving himself aggrieved by the decree made and entered on the 31st day of January, 1908, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, pro-

ceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 31st day of January, A. D. 1908.

HERBERT S. HADLEY,
*Attorney General of the State of Missouri,
Counsel for Defendant.*

45 Afterwards, to wit, on the 31st day of January, 1908,
the following Order granting Appeal was filed and entered
of record:

In the Circuit Court of the United States, Western District of
Missouri, Western Division.

No. 3242. Equity.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Plaintiff,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Order.

Now on this January 31, 1908, after the order for a temporary injunction was made herein and after the final decree was ordered of record and in open court, comes the defendant and prays an appeal to the United States Supreme Court, which appeal is granted and the assignment of errors ordered filed. And an appeal bond is presented and is filed and is approved, but which bond will not serve the office of a supersedeas. A citation is signed by the presiding judge and service thereof accepted by counsel for complainants, and said citation is filed.

(Signed)

SMITH McPHERSON, *Judge.*

46 The Bond for Appeal approved and filed herein on the 31st
day of January, A. D. 1908, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division
of the Western District of Missouri.

In Equity. No. 3242.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri,
Defendant.

Bond of Appeal.

Know all men by these presents, that we John E. Swanger, Secretary of State of the State of Missouri, and ——— and ———

his sureties, are held and firmly — unto Atchison, Topeka & Santa Fe Ry Co. in the full and just sum of twenty five (\$25.00) to be paid to the said Atchison, Topeka & Santa Fe Ry. Co. its certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of January, A. D. in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at the Circuit Court for the 31st day of January 1908, in a suit pending in said court between The Atchison, Topeka & Santa Fe Railway Co. Complainant and John E. Swanger, Secretary of State of the State of Missouri, defendant, a decree was rendered against the said John E. Swanger and the said John E. Swanger having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Atchison, Topeka & Santa Fe Ry. Co. and its attorneys, citing and admonishing them to

be and appear at the session of the Supreme Court of the
47 United States to be holden at the City of Washington on the
— day of — next,

Now the condition of the above obligation is such that if the said John E. Swanger shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and effect.

JOHN E. SWANGER. [SEAL.]

Approved but not as a supersedeas.

(Signed)

SMITH McPHERSON,
*District Judge of the Southern District of Iowa,
Presiding in the Circuit Court of the Eighth
Judicial Circuit.*

48 The opinion filed herein is in words and figures as follows:

In the Circuit Court of the United States, Western District of
Missouri.

No. —.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Complainant,

vs.

JOHN E. SWANGER, Secretary of State, and Others, Defendants.

H. A. Low and Paul E. Walker, for Complainants.

Herbert S. Hadley, Attorney General, and John Kennish, Assistant Attorney General, for Defendant.

And Six other like cases against the same Defendant.

The same appearances for the defendant.

Thomas R. Morrow for the Atchison, Topeka & Santa Fe R. R. Co.
Frank Seabee and W. F. Evans for the St. L. K. C. & C. Ry. Co.

Frank Hagerman for the Chicago, Milwaukee & St. Paul Ry. Co.
E. L. Scarritt, W. C. Scarritt, E. H. Jones and C. M. Miller for the
Chicago and Alton Railway Company.

O. H. Dean, W. D. McLeod, H. C. Timmonds, and O. M. Spencer
for the Chicago, Burlington & Quincy Ry. Co.

Frank Hagerman and Kimbrough Stone for C. & G. W. Ry. Co.

Opinion.

SMITH McPHERSON, *Judge*:

All these cases present the same question, and are alike in fact, except with reference to one company which came in the state after 1901, a matter not controlling the decision herein.

Subject to that statement, all the companies, either by purchase or construction, between the years 1870 and 1891, became the
49 owners of a line of railroad into and across the state, at an expenditure of many millions of dollars, doing both a state and interstate business.

By an Act of the Legislature of the year 1870, it was provided that two or more roads could consolidate, and authorized a road of an adjoining state to build a line into the state, or to buy one already constructed, and thereby form a continuous line. The statute further provided that such non-resident corporation "shall be subject to all regulations and provisions of law governing railroads in this state. And may sue and be sued, in all cases, and for the same causes, and in the same manner as a corporation of the state might be sued."

The non-resident corporation in all respects was given the same powers and was made subject to the same burdens, as a resident corporation.

In 1891 the Legislature enacted, that any corporation for pecuniary profit, created under the laws of another state, shall, before allowed to continue in business, file with the Secretary of State a copy of its Articles of Incorporation, and a statement as to its stock, and other matters, pay for and receive a certificate from the Secretary of State, showing that it has the right to do business.

The bill of complaint herein attacks the validity of an Act of the Legislature of 1907.

Section One (1) provides that if any railway corporation created and existing under the laws of any other state, and doing a railway business from one point in this state to another point within this state, shall without the written consent of the other party remove a case from the State court to an United States Court, or shall without said written consent institute any suit against a citizen of the state, in any Federal Court, then the Secretary of State shall revoke the license to do business from one point within the state to any other point within the state, both as to passengers and freight. And doing
50 such business shall subject it to a penalty of not less than two thousand, and not more than ten thousand dollars for each offense, which disability shall continue for five years.

It is alleged that complainant is about removing a case, and the

Secretary will follow that by revoking its right to do business. The defendant contends that this in effect is an action against the state, in violation of the Eleventh Amendment to the Constitution. The complainant contends that the Act of 1907 impairs its contract with the state, and denies it the equal protection of the laws if enforced, and is in contravention of the United States Judiciary Statutes.

This court is mindful of the criticism by many laymen, as well as by some lawyers, to the effect that United States Courts have no right, nor even the power, to decree the invalidity of State statutes. The argument, or, rather, the talk is, that the people know what they need, and that their representatives in Legislature assembled alone should determine what statutes we must have. And when so determined and evidenced by legislative enactment, that the courts should not interfere by decree, and thereby thwart the legislative will. In other words, Great Britain has the model government.

This is a most attractive and persuasive argument to many, and has been from the organization of our government. It was the keynote to the Kentucky and Virginia Resolutions. The *all* power of the state as against the Nation, was the argument of the minority in the Convention of 1787, and in the Convention of the States called to ratify that work. Webster in his second reply to Hayne, defining it, said:

"I understand the honorable gentleman from South Carolina to maintain that it is a right of the State legislature to interfere whenever, in their judgment, this government transcends its constitutional limits, and to arrest the operation of its laws.

"I understand him to maintain an authority, on the part of the States, thus to interfere, for the purpose of correcting the exercise of power by the general government, or checking it, and of compelling it to conform to their opinion of the extent of its powers.

51 "I understand him to insist, that, if the exigency of the case, in the opinion of any State government, require it, such State government may, by its own sovereign authority, annul an act of the general government which it deems plainly and palpably unconstitutional.

"This is the sum of what I understand from him to be the South Carolina doctrine, and the doctrine which he maintains."

Seldom does a court—and particularly an United States Court—hold a State enactment void, but that the old argument and criticism are made, charging the Courts with usurpation.

And this is not confined to laymen. Lawyers indulge in that kind of talk. An issue of a leading newspaper, recently reporting a convention of Attorneys General, is the authority for the statement that the point to an address of one member from a State East of the Mississippi River, was, that the Fourteenth Amendment is a work of great iniquity, in that it limits the power of the States; that the Amendment was adopted for the Negro only.

And the so called argument is not made by laymen and lawyers only. There recently appeared from the pen of the Chief Justice of one of the Original Thirteen States, an article denunciatory of the practice of United States Courts decreeing statutes void as being in conflict with the Constitution. He is an accomplished lecturer and a

writer of fine diction, but he is pressing views with reference to the Constitution wholly at war with the generally prevailing view of lawyers, jurists and statesmen. Admitting that the doctrine is now well established, he declares it to be an evil to allow or tolerate United States Courts holding State statutes void because of a conflict with the Constitution. He builds an argument on an alleged statement of fact, which statement is not a fact, that it was proposed in the Convention of 1787,

"that the Judges should pass upon the constitutionality of the Acts of Congress. This was June 5th, receiving the votes of only two of the states."

52 As a statement of history, no greater error can be found in print. The scheme before the Convention was to have a Council of Revision composed of the Executive and of Justices of the Supreme Court. In other words, Judges should have, with the President, the veto power. That was voted down.

His second statement is, that Mercer reflected the views of a majority of the Convention when he said,

"that he disapproved of the doctrine that the Judges, as expositors of the Constitution, should have authority to declare a law void. He thought that laws ought to be well and cautiously made, and then be incontrovertible."

No doubt Mercer said that, but he did not reflect the views of a majority. Mercer was a delegate from Maryland, and had so little heart in the work, that he did not appear in the Convention until in point of time the Convention was nearly half over. But he appeared in time to oppose the great principles of our government. When the Convention was about adjourning, Dr. Franklin, too feeble to talk, gave a paper to James Wilson to read, urging that all objections be put to one side, and begging that every member sign the great instrument. Mercer was not persuaded, and refused to sign. On the same day it was proposed to place the journals in the hands of the President, (General Washington,) to the end that they might be preserved; and Mercer voted *No*. The Convention having adjourned, Mercer was elected as a delegate to the Maryland Convention called to ratify or reject the Constitution and with a small minority voted against the ratification of the Constitution. Bancroft recites in his history, that Washington wrote to Madison as to the efforts made in the Maryland Convention to reject the Constitution:

"Chase once more made a display of all his eloquence: John F. Mercer discharged his whole artillery of inflammable matter: and Martin rioted in boisterous language. But no converts were made: no, not one."

All should decline to follow the teaching of Mercer in constitutional law.

53 In contrast with that, it is delightfully refreshing to read from the address of the venerable jurist, Justice Harlan, delivered but a few weeks since, in upholding the powers of both the states and the nation, insisting that each shall keep within their own limits, to the end that this government may continue to exist; that the states may manage and control all local affairs, but they shall

not control commerce between the states, nor impair contracts, nor do many other things prohibited; and that this government may not become as it was under the Articles of Confederation. He said:

"What, let me ask, are some of the grounds upon which the pessimist of these days bases his fears for the safety of our institutions? He persuades himself to believe that the trend in public affairs today is toward the centralization of all governmental power in the nation, and the destruction of the rights of the States. If this were really the case, the duty of every American would be to resist such a tendency by every means in his power. A national government for national affairs and State governments for State affairs, is the foundation rock upon which our institutions rest. Any serious departure from that principle would bring disaster upon the American people and upon the American system of free government. But the fact is not as the pessimist alleges it to be. The American people are more determined than at any time in their history to maintain both national and State rights, as those rights exist under the Union ordained by the Constitution. * * *. The best friends of State rights, permit me to say, are not those who habitually denounce as illegal everything done by the General Government, but those who recognize the Government of the Union as possessing all the powers granted to it in the Constitution, either expressly or by necessary implication; for, without a General Government possessing controlling power in relation to matters of national concern, the States would have no prestige before the world and would be in perpetual conflict with one another. With equal truth, it

54 may be said, that the best friends of the Union are those who hold that the States possess all governmental powers not granted to the General Government, and that are not inconsistent with their own Constitution or with the Constitution of the United States or with a republican form of government."

The National and State Governments do not conflict. The one or the other has the power to confer all rights needed, and to remedy all wrongs, and to say that neither has such power, is to assail our form of government.

James Wilson in a letter to Washington presented the entire case when he wrote:

"Neither vacancies nor interferences will be found between the limits of the two jurisdictions which together compose, or ought to compose, only one comprehensive system of government and laws."

The views of Justice Harlan and James Wilson are those entertained by this court.

There is a prevalent notion that United States Courts only declare State statutes void, as being in conflict with the National Constitution. All informed men know that the State courts so hold for one, as well as an additional reason, because by Article VI of the National Constitution it is provided:

"All executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution."

So that it necessarily follows, that State courts, when so persuaded, will not only declare State statutes void when in conflict with the

State Constitution, but State courts will declare Statutes of Congress void when in conflict with the National Constitution. And all who appreciate our form of government under its written Constitution, knowing that the general government is one of limited powers, but supreme wherein empowered to act, endorse the right, power, and the duty from which there can be no escape, of all courts to pass upon the validity or invalidity of Congressional enactments.

55 State judges take an oath to support the Constitution of the United States, but they do not take an oath to support all Congressional enactments. That such has been the practice, one need but look at the state decisions. For a partial list of such cases, see:

Moore vs. Clymer, 12 Mo. App. 11.
 Clark vs. Mitchell, 64 Mo. 564.
 King vs. Insurance Co., 195 Mo. 290 (92 S. W. Rep. 892).
 Latham vs. Smith, 45 Ill. 29.
 Craig vs. Dimock, 47 Ill. 308.
 Bunker vs. Green, 48 Ill. 243.
 Express Co. vs. Haines, 48 Ill. 248.
 Wilson vs. McKenna, 52 Ill. 43.
 Griffin vs. Ranney, 35 Conn. 239.
 Moore vs. Quirk, 105 Mass. 49.
 Clemens vs. Conrad, 19 Mich. 170.
 Bumpass vs. Taggart, 26 Ark. 398.
 Wallace vs. Cravens, 34 Ind. 534.
 Moore vs. Moore, 47 N. Y. 467.
 Davis vs. Richardson, 45 Miss. 499.
 Griswold vs. Hepburn, 63 Ky. 20.
 Ruffin vs. Board, 69 North Carolina, 498, 510.

It will be observed that three of these are Missouri cases.

The different holdings were made by the State courts because all State judges, as well as United States judges, are required by Article VI of the Constitution to take an oath to support the Constitution of the United States, and by reason of that other provision of the same Article, which provides:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

And these different state courts as in duty bound gave their respective judgments as to whether Congressional enactments were in conflict with the Constitution; and finding the conflict to exist: upheld the Constitution and decreed the statutes void; And

56 in one case at least—that of Griswold vs. Hepburn—the judgment of the Court of Appeals of Kentucky was affirmed by the Supreme Court of the United States. And such holdings should not be otherwise, because, first of all, the Constitution is the supreme law of the land, and next to that are the enactments of Congress, provided always such enactments are "pursuant" to the Constitution.

The most attractive argument to some lawyers of recent days, is that the State courts alone in the first instance should pass upon the question as to the validity of State statutes, with the right of the defeated party to carry the case for final decree to the Supreme Court of the United States. Such arguments are plausible, are convincing to many good people, but are so dangerous as to amount to a heresy. It is the extreme of "State Rights" in a new form. The argument is plausible, because they admit that the final decision should be made by the United States Supreme Court upholding the National Constitution, and overthrowing state legislation, when the two are in conflict. So they argue that the State courts should first pass upon the case, and if the statute is upheld, the party defeated can have a remedy by writ of error, carrying the case to the National Supreme Court.

A writ of error is for the correction of erroneous rulings in matters of law, and not for a review of questions of fact. And it can be safely predicted, that in all cases, including these in equity, taken up by writ of error, that the contention will be that all questions of fact will be foreclosed. Such is the rule, and a writ of error in a case turning on questions of fact, concerning which the evidence is in conflict, will be no remedy at all.

And the question naturally arises whether such will be the result. If so, then the Supreme Court is practically deprived of power in all such cases, with the result that the conflicting state court decisions will remain in force, instead of having that which is so desirable, viz: a decision by the National Supreme Court on all National questions.

The real welfare of this country demands that all questions, 57 fact as well as of law, pertaining to our National Constitution be ultimately decided by our National Supreme Court, to which all patriotic citizens should and do yield the most cheerful obedience. That a writ of error to a State court in a chancery, as well as in a law case in which the evidence is in conflict, will avail nothing, one need but read the case of *Egan vs. Hart*, 165 U. S. 188. And see *Bement vs. National Co.*, 186 U. S. 70 83.

The only remedy to correct the decision of the highest court of the state is by writ of error, in chancery cases as well as in actions at law. In a large per cent of these chancery cases the case turns solely on questions of fact, with reference to which the evidence is in conflict. And an important inquiry is thereby suggested, as to whether if the effort is successfully made to keep litigation involving Federal questions in the State courts, depriving the National courts from passing on questions of fact in chancery cases, as to whether such party thus desiring a review is not deprived of due process of law. This is a question of great moment, but not now for discussion in this case.

It is often urged that cases in the United States Courts are too tedious and that too much time is taken to obtain a final decision. This is an error. Under the equity rules, if either party desires the case be expedited, it can be carried to final decision as quickly or more so, than in most of the State courts.

It is due to counsel for defendant to say that several of the fore-

going propositions were not controverted by them in argument. But it has been deemed proper by the court on its own motion to briefly discuss them.

I now turn to the questions presented by the bill of complaint. It is contended that this action, although against a State officer, is in effect a suit against the State of Missouri. The Eleventh Amendment to the Constitution recites: that

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

58 That the Supreme Court has passed upon this many times, is known by all lawyers. But there are no conflicts in the decisions, although in some of the cases against State officers, it was held that the actions were in effect suits against the state, and in other cases, the decisions were, that the State in effect was not being sued. No one questions the meaning and purpose of the Amendment, and no one is in doubt as to the reason for adopting it. The questions in every case is as to the facts of the case, and as to the relief sought. And in each case as it arises, such is the question.

It would be wholly academic to now discuss the question further than to mention the two lines of cases. In *Fitts vs. McGhee*, 172 U. S. 516, and like cases, the holding is that if penalties, and fines, and costs only are involved, that United States Courts cannot take jurisdiction. In the case of *M. K. & T. R. R. Co. vs. The Missouri Commissioners*, 183 U. S. 53, construing the Missouri statutes, and like cases, the holding always is, that if in addition to fines, and penalties, property rights are invaded, that an action for relief is not in effect a suit against the state.

Suffice it to say, that the Missouri statutes have been considered and construed by the Supreme Court. Whatever the decisions have been, or may be hereafter from other states, this case is binding on this court sitting in Missouri, construing Missouri statutes, and should be observed until overruled, which is so highly improbable as to merit no consideration. Or, if mistaken in this, when expressly overruled will be the time to further consider this.

By Article III of the Constitution, it is provided, that,

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

By section two thereof it is provided:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and to controversies between citizens of different states."

59 The judiciary act of 1888 covered this with particularity, providing that United States Courts shall have jurisdiction in all cases of a civil nature wherein the amount in controversy shall exceed two thousand dollars, in several classes of cases, two of which only need be stated. The one is, in the language of the Constitution, "in an action between citizens of different states." And as to that, the uniform holding for many years has been, that a cor-

poration shall be regarded as a citizen of the state where incorporated. The other class is, that jurisdiction is conferred, both by the Constitution and the Act of 1888, regardless of citizenship, "in a case arising under either the Federal Constitution, or the laws of the United States."

So that if the Act of the Missouri Legislature of 1907, hereinbefore referred to, is valid, then no non-resident railway company can have any of its litigation in the United States Courts; but a railway corporation organized under the laws of Missouri can bring its actions in such courts against citizens of Missouri, provided such cases "arise under the Constitution or laws of the United States." And it is said that at least three of the trunk lines of road in the state are Missouri corporations. They can bring their cases of the nature referred to in the United States Courts, but if the non-resident companies do that, they are not only subjected to heavy penalties, but the penalties if enforced drive them from doing any and all business of a state character. And if the Statute of 1907 is valid, then we have one of two situations presented.

1. The company must cease doing a state business. Passengers from one point to another point within the state, must not be carried. And the same as to freight. Regardless of the fact that local aid may have been voted and donations made for the building of the road, the people along the line can longer have no road except for interstate and through business with other states, and the contract by the road with the state to perpetually maintain and operate its road is at an end.

60 2. Or, the company must surrender its rights under the Constitution and the Statutes of Congress, giving the right to have some of their litigation in the United States Courts.

There is no escape from the one conclusion or the other. And this presents an important question for decision. The Missouri statute does not provide that the litigation of non-resident railway corporations shall not be had in United States Courts, but provides that if carried there that its rights of doing business shall cease for five years.

An analysis of a few of the decisions of the Supreme Court will lead to the conclusion about which there can be no doubt.

In *Doyle vs. Insurance Co.*, 94 U. S. 535, there was under consideration a statute of Wisconsin which provided that if any foreign insurance company removed any case to an United States Court, that its right to do business in the state should cease. A case having been removed, the company sought to enjoin the revocation of its license, and from being ousted from the state. The Supreme Court held the statute to be valid and enforceable. The recent case of *Prewitt vs. Insurance Co.*, 202 U. S. 246, construing a Kentucky statute, is to the same effect. There are many other decisions of like holdings by judges on the Circuit, which will not be reviewed.

But from these two decisions, and the one so recent, it can be stated that the undoubted rule is, that a foreign corporation can be kept out or excluded when once in, by any state, and this with or

without good reason, and for no reason at all. Such is the general rule, but to which there are exceptions, presently to be noticed.

In the two cases cited the company had no property in the state, and had made no investments, but had a license to do an insurance business. It is true the company had advertised its business, established agencies, and incurred expenses of those kinds. So that as to a foreign insurance company, it is wholly immaterial for what reason the state does not desire it to continue in business. It can be excluded, and the company can have no relief.

61 The state officers insist that the two cases cited, and those of like holdings, demand at the hands of this Court a decree upholding the validity of the Missouri statute in question.

The concluding paragraph of the majority opinion of the Doyle case will arrest the attention of anyone investigating the question in all its phases. It was said:

"No right of the complainant under the laws of the Constitution of the United States, by its exclusion from the state is infringed; and this is what the state now accomplishes. There is nothing therefore, that will justify the interference of this court."

Whether a state can prevent a foreign corporation engaged in interstate commerce from coming in the state, will not be here discussed. An insurance company is not engaged in commerce, and therefore that question was not covered in the cases cited.

In the cases at bar a license to do business is not the question. Each of the companies invested millions of dollars, and it is now in the state and cannot remove. To prevent it from doing business, means appropriating its property, or destroying it, without making any compensation therefor. It was invited to come into the state, and was told by the laws then in force, that it would have the same and like standing as resident companies, with benefits as great, and with burdens no greater. After these investments had been made, and which cannot be withdrawn, it is declared by legislation, that no kind of litigation shall be carried on by it in any court other than the State courts, but leaving to the railway corporation organized under the laws of the state, to go to the National Courts with its litigation of all kinds arising under the laws or Constitution of the United States. The State corporation, organized under its laws, may sue or be sued in any court, State or National, if there is a federal question, but a foreign corporation doing business as a competitor must at all times be subject to the State courts; or if it ventures into a National Court, then all investors lose all.

The case of *Barron vs. Burnside*, 121 U. S. 186, arose under an Iowa statute much like and in principle the same as the Missouri statute now being considered. The Supreme Court held the statute to be void. The Iowa statute required a foreign corporation desiring to do, or continue in business in Iowa, should file with the Secretary of State a resolution designating a person upon whom service should be made, whereupon a permit to do business should be issued. It was further provided, that if any non-resident company should remove a case to the United States Court on the ground of diverse citizenship, that such permit should be vacated, and not again given a permit for three months, and in

the meantime doing business should subject it to large penalties. The decision holding the statute void was by an unanimous court. And the statute was declared void in the following language, not capable of being misunderstood by anyone:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

And the privilege secured to it, which the court was discussing was the privilege of having its litigation in United States Courts.

It will be observed that this decision was long after the Doyle case, and by express mention, it was held that the Doyle case did not control.

On the foregoing, the case at bar could be safely grounded, but for another reason the statute is void, as being in conflict with the National Constitution, in that it is repugnant to the provision which reads, "No state shall pass any law impairing the obligation of contracts."

It is stoutly denied that there is any contract, and of course there must be a contract before the obligation of one can be impaired.

What was the contract? The state gave it the power of eminent domain. In many instances it gave it pecuniary aid. It gave it the right to charge reasonable prices for its services. It
63 promised it the equal protection of the law as to taxation, and equal protection with others, against all who might seek to injure its property or earning power. The state in effect said, "Make your investments, and we will give you these rights." The company accepted the offer and made the investments, and now cannot remove if it so desired, because it has a contract in perpetuity to serve the people as a common carrier, and to give efficient service for reasonable remuneration. That there is a contract, is easily discerned.

And that being so, the most recent case of all, that of the American Smelting Company vs. Colorado, 204 U. S. 103, is decisive of this phase of the case. Colorado enacted a statute that foreign corporations entering the state should be on an equality with home corporations. While such legislation was in force, the complainant entered the state and made large investments to carry on its business within the state. The Supreme Court of the United States decided that that was a contract between the corporation and the state. After such investments had been made, the state by legislation attempted to require the foreign corporation to pay more taxes than could be exacted from resident corporations, ignoring its promise by legislation in force when the non-resident corporation went into the state, that the taxes should be equal. The Supreme Court decided that the state was thereby impairing its contract.

From the foregoing the opinion of this Court is as follows:

1. The Doyle and Prewitt cases do not have the slightest application to the case at bar. In those cases property rights were not involved. The mere naked right to a license to do business by a foreign corporation was considered.

2. The Missouri Statute of 1907 is void, because it allows a resident company to sue in the federal court, if there is a federal question, and denies that right to a non-resident company.

3. Regardless of the last preceding statement, the statute is void because it seeks to take from the complainant its right to bring or remove a case to the United States Court, which right is given by the Constitution, and the Acts of Congress, which by Article VI of the Constitution is declared to be "The Supreme Law of the Land, anything in the Constitution or laws of any state to the contrary notwithstanding."

4. The statute is void, because it is an effort to impair, and to repudiate the contract of the state made with the company, by which it was induced to come into the state, making investments in large sums, and was authorized to do a state business, but now declaring that it shall not do such business, thereby rendering it insolvent, and taking from the people along its line the use of a railway for state business, unless the company will surrender under coercion rights given it by the National Constitution and valid enactments of Congress.

This court recognizes the rule, that presumptively all legislation is valid. But it is only presumption, and in no sense conclusive. This court recognizes that all doubts should be solved in favor of upholding legislation. But there are no doubts in this case.

This court recognizes that the Secretary of State will be enjoined from doing that which he is commanded to do by state legislation. But it is also well known, that if this court is in error, that there can be a reversal by the Supreme Court within less than a year of time.

There is but a single question presented. The complainant asserts rights under the National Constitution and laws enacted by Congress. The defendant asserts rights under an Act of the Missouri Legislature, and insists that there is no conflict.

This court holds that there is a conflict. And there being a conflict, the one or the other must give way. And the Constitution and Laws of Congress "being the Supreme Law of the Land" as of course the enactments of the State must yield.

The defendant's demurrer to the bill of complaint is overruled, and as he declines to plead further, a final decree will be entered as prayed, perpetually enjoining him and his successors from attempting to give force to the Missouri Statute which seeks to prohibit the Railway Company from doing business within the state, if it seeks to have any of its litigation in the United States Courts.

Kansas City, Missouri, January 31, 1908.

66 UNITED STATES OF AMERICA, *set*:

I, Adelaide Utter, clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignment of errors, and all proceedings in the cause wherein The Atchison, Topeka and Santa Fe Railway Company is complainant and John E. Swanger, Secretary of State of

the State of Missouri, is defendant, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 13th day of February, A. D. 1908.

[Seal of the United States Circuit Court for the Western
District of Missouri, Western Division.]

ADELAIDE UTTER, *Clerk*.

Endorsed on cover: File No. 21,156. W. Missouri C. C. U. S. Term No. 151. John E. Swanger, secretary of state of the State of Missouri, appellant, vs. The Atchison, Topeka & Santa Fe Railway Company. Filed April 30th, 1908. File No. 21,156.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1909.

JOHN E. SWANGER (SUCCEEDED BY
CORNELIUS ROACH), SECRETARY OF
STATE OF THE STATE OF MISSOURI,
Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY.

No. 151.

APPEAL FROM THE CIRCUIT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF MISSOURI.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal by John E. Swanger (succeeded by Cornelius Roach), Secretary of State of the State of Missouri, from a final decree of the Circuit Court of the United States for the Western District of Missouri, entered on January 31, 1908 (Rec. pp. 33-43), declaring a

certain act of the Missouri Legislature, approved March 13, 1907, unconstitutional, and perpetually enjoining appellant in his official capacity as Secretary of State, and his successors in office, from attempting to give force to said act, which seeks to prohibit foreign railway companies from doing business within the State, if, without the consent of the other party, such companies remove to the Federal Court any suit brought by or against it in the courts of the State, or shall institute in the Federal Court any suit against any citizen of the State. (See Appendix, pp. 53-55.)

The suit was begun by the filing, on September 6, 1907, of a bill of complaint (Rec. pp. 1-16), and on October 9, 1907, a supplemental bill (Rec. pp. 22-24) in the Circuit Court of the United States for the Western District of Missouri.

The bill alleges in substance that appellee is a railway corporation, organized under the laws of the state of Kansas, and doing a railway business, being thereto duly authorized, in the State of Missouri and six other states and two territories.

It is stated that its main line of railway, in and through the State of Missouri, was constructed in the year 1886 or 1887 by the Chicago, Santa Fe & California Railway Company, a corporation of the state of Illinois, which was the constructing agency of the Atchison, Topeka & Santa Fe *Railroad* Company, a corporation of the state of Kansas, and that on December 5, 1895, appellee purchased, under foreclosure proceedings, all the property of the two corporations mentioned, and thereby succeeded to all the rights, powers and privileges formerly belonging to and enjoyed by such companies.

It is further alleged that at the time appellee's predecessor constructed its road in the State of Missouri, there was, and yet is, a general statute, enacted by the

Missouri Legislature in the year 1870 (Appendix, pp. 61-66), under and by the provisions of which it was authorized to construct its road, and was guaranteed all the rights, privileges and immunities *granted and vouchsafed in the Constitution and laws of the State of Missouri, upon the same basis and to an extent identical with the rights, privileges and immunities conferred by the general laws of the State of Missouri upon domestic railway corporations.*

It then charges that its entrance into the State of Missouri and the acquisition of property therein under the authority of the act of 1870, created a contract between it and the State, the obligations of which are impaired by the enforcement of the act of March 13, 1907, and for that, as well as other reasons assigned, the act of March 13, 1907, is unconstitutional and void.

It prays that said act be so declared, and that appellant be permanently restrained from attempting to enforce its provisions and from revoking and cancelling, or attempting to revoke and cancel, appellee's certificate of authority because of the removal of certain suits which the complaint alleges were removed by appellee from the State to the Federal courts, upon the ground of diversity of citizenship.

On September 16, 1907, a temporary restraining order was issued, and on January 31, 1908, the following demurrer (Rec. pp. 27-28) was filed by appellant:

"The above named defendant, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's bill of complaint to be true in manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of demurrer sheweth:

First. That said complainant has not in

said bill of complaint made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against defendant, or to any relief whatever.

Second. It appears upon the face of complainant's bill of complaint that complainant has an adequate remedy at law.

Third. It appears upon the face of complainant's bill of complaint that this court has no jurisdiction to hear and determine this cause, or to grant any relief therein whatsoever, for the reason that said suit is in effect a suit against the State of Missouri within the meaning of the Eleventh Article of Amendment to the Constitution of the United States.

Fourth. It appears upon the face of complainant's bill of complaint that complainant is a railroad company organized under the laws of the State of Kansas, and that it has since the year 1875, and prior to the year 1907, consolidated, by purchase or otherwise, with a railroad company organized under the laws of the State of Missouri, and that by virtue of said consolidation it has secured all or a part of the lines of railroad in the State of Missouri now owned and operated by said complainant, and that, therefore, said complainant was not entitled, under the provisions of section 18 and section 21 of article XII of the Constitution of Missouri, and section 1060 of chapter 12, article 12, article II, Revised Statutes of Missouri, 1899, to remove any suit instituted against it in the courts of Missouri to the Federal courts, but that said complaint became and remained by virtue of said consolidation and the Constitution and stat-

utes of the State of Missouri, subject to the jurisdiction of the courts of Missouri, as if said corporation had been organized under the laws of the State of Missouri.

Wherefore, and for divers other good causes of demurrer appearing in the complainant's bill of complaint, defendant demurs, thereto and demands the judgment of this court whether he shall be compelled to make any further or other answer to said bill of complaint, and prays to be hence dismissed with the costs and charges in his behalf most wrongfully sustained."

On the same day the demurrer was overruled, and appellant refusing to plead further, the final decree was entered.

SPECIFICATION OF ERRORS

1st. That the court erred in overruling the demurrer to the bill.

2nd. The court erred in granting an injunction against the defendant, as prayed in the bill.

3rd. The court erred in decreeing the act of the Legislature of the State of Missouri, approved March 13, 1907, and set out at length in complainant's bill, unconstitutional and void.

4th. The court erred in granting the temporary injunction against defendant.

5th. The court erred in granting a permanent injunction against defendant.

BRIEF OF ARGUMENT.

APPELLANTS' CONTENTIONS.

I. If the invalidity of the statute in question were conceded, the facts stated in the complaint do not warrant injunctive relief against this appellant.

II. Appellee did not succeed to the privileges and immunities formerly belonging to its predecessor.

III. The legislative act of 1870, conferring upon foreign railway corporations the privilege to conduct an intrastate business, and appellee's entrance into the State, and its acquisition of property therein, did not create an irrevocable contract which precludes an enforcement of the act in question.

IV. The act assailed by this suit is valid, and is not objectionable to the provisions of the Federal Constitution.

V. Upon the facts stated appellee is in no position to invoke the doctrine of a violation of the alleged contract.

VI. The right to sue and sued in the Federal court was not a subject embraced within the alleged contract.

VII. The court erred in granting a permanent injunction against appellant.

POINT I.

If the Invalidity of the Statute in Question Were Conceded, the Facts Stated in the Complaint Do Not Warrant Injunctive Relief Against This Appellant.

The complaint discloses that appellee is not entitled to the relief sought against this appellant. The grava-

men of its complaint is that it has an *irrevocable right to use its property and conduct its intrastate business in Missouri*, and that the act of 1907, when enforced, will operate to deprive it of *that right*.

By the provisions of this act appellant is not charged with the performance of any duty or act which can result in substantial loss to appellee or the deprivation of the use of its property or right to conduct its business, if, as alleged, the legislative act referred to is invalid, and appellant without any authority to cancel or revoke its right.

The sole duty enjoined upon appellant by the act in question is to "revoke the license, permit, certificate of authority and right of such corporation and its agents to carry passengers and freight from one point in this State to another" "and to give notice of such revocation by publication in some newspaper in the State."

When appellant enters on his records his order of revocation and gives notice thereof in the manner designated, his powers are at an end, and this is all the complaint avers he has threatened to do.

The very basis of this action necessarily assumes that any such act or order on *his* part will be absolutely void and ineffectual for the purpose of depriving appellee of its rights and property.

If this be true, not a dollar will be taken from appellee, no pecuniary nor other obligation violated, none of its property affected, nor any of its rights denied by the threatened action of appellant, but its rights and remedies remain intact, and can be invoked in the courts whenever the events require. There is no penalty which it is the duty of appellant to enforce under the act in question, and no such threatened action on his part is charged in the complaint. The duty of enforcing the revocation and preventing appellee from *exercising and enjoying* its al-

leged right devolves upon officials who are not parties to the record.

To entitle a person to the injunctive powers of the court he must establish, as against the defendant, an actual and substantial injury to his property rights, and not simply a technical and inconsequential wrong. *Arbuckle v. Blackburn*, 191 U. S., l. c. 414-415.

In *Schurz v. Cook*, 148 U. S., the contention was made that the refusal of the Secretary of State to recognize certain articles and the right of the applicant to do business in the State gave effect to and enforced a law which impaired the obligations of a contract.

In denying relief by mandamus, this court said (l. c. 409) :

"But it is urged by plaintiffs in error that, under the decisions of the highest court of New York, they cannot, as private persons or as an association, so use, maintain and operate the railroad which they have purchased. Without reviewing the New York cases cited in support of this position, we doubt whether they go to that extent. But if they so held under any law of the State passed since the execution of the mortgages under which plaintiffs in error have succeeded to the properties and franchises of the railroad sold under foreclosure, as already mentioned, *then* the question would be whether the impairment of the obligation of the contract would not consist in *denying* the purchasers the right to use the property and franchises so acquired."

When appellant proclaims the revocation, and the officers upon whom rests that duty, attempt to collect the penalties prescribed, or otherwise interfere with the prop-

erty or the *alleged right of appellee to conduct its business in Missouri*, will be time enough to consider what should be done to prevent it. *McChord v. L. & N. Ry. Co.*, 183 U. S., l. c. 495-496; *Patterson vs. Bark Eudora*, 190 U. S., l. c. 176; *Hatch v. Reardon*, 204 U. S. l. c. 160.

The complaint is utterly insufficient to warrant injunctive relief on the ground of a multiplicity of suits.

There is no allegation that appellant's order of revocation will be followed by the institution of multiplicitious suits by the Attorney-General or prosecuting attorneys, upon whom devolve the duty of preventing such companies from carrying freight and passengers from one point to another in the State, or, in other words, *from using their property and conducting their business in the manner appellee contends they are fully authorized.*

In the absence of such allegations, which would be controvertible, if made, the court cannot presume, in order to grant extraordinary relief, that public officials will subject appellee to multiplicitious and vexatious suits. This is especially true for the purposes of an action whose very basis is the alleged unconstitutionality of the statute upon which such suits, if instituted, would of necessity be predicated. *Pacific Express Co. v. Seibert*, 44 Fed., l. c. 315; 142 U. S., 339.

POINT II.

Appellee Did Not Succeed to the Privileges and Immunities Formerly Belonging to Its Predecessor.

An immunity from the exercise of governmental power granted a railway company does not pass to the purchaser of its property and franchises at sale under proceedings to foreclose mortgages. *Rochester R'y. Co. v. Rochester*, 205 U. S. l. c. 241; *Norfolk & Western Rail-*

road v. Pendleton, 156 U. S. l. c. 672-673; *L. & N. R'y Co. v. Palmes*, 109 U. S. l. c. 252; *St. Louis & San Francisco R'y. Co. v. Gill*, 156 U. S. l. c. 656; *Schurz v. Cook*, 148 U. S. 397.

POINT III.

**The Legislative Acts of 1870 and 1891, Confer-
ring Upon Foreign Railway Corporations the
Privilege to Conduct an Intrastate Business,
and Appellee's Entrance Into the State, and
Its Acquisition of Property Therein, Did Not
Create an Irrevocable Contract Which Pre-
cludes an Enforcement of the Act in Question.**

By the general provisions of the legislative acts of 1870 and 1891, under which appellee obtained its authority to do business in Missouri, the State did not purport to bind itself irrevocably, but merely granted a privilege. By these laws the Legislature did not address any particular persons and make promises in order to induce them to invest money, but merely afforded a means by which any corporation could operate in a profitable field of its own selection. It simply framed a general scheme of public improvement and incidentally granted foreign railway companies a bare license to enter the State, and, in this connection, indicated a course of conduct to be pursued until circumstances or its views of policy changed.

Railway companies are public service corporations, licensed for public purposes, and conducting a business intimately connected with the public welfare. It is, therefore, the highest public policy to keep them strictly within legislative control, and contracts depriving the State of this sovereign power must not be wrested from unwilling words, or based on doubts and ambiguities.

In Pearsall v. Great Northern Railway Company, 161

U. S. 645, after recognizing the principle that limitations upon the power of the Legislature must be construed in subservience to the general rule that grants by the State are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language, this court reviewed at some length the cases in which the claim to irrevocable grants had been ruled adversely to the claimant, and concluded with the following language:

"We have epitomized these cases, not because they have any decisive bearing upon the question at issue, but for the purpose of showing the general trend of opinion in this court upon the subject of corporate charters and vested rights."

The acts relied upon to constitute a contract are general laws applying to all foreign corporations, and not specific acts, having reference solely to this particular appellee. That this is a feature for consideration is evident, as it has been made the basis of a distinction in cases involving public grants. *Powers v. Detroit & Great Haven R'y*, 201 *U. S. l. c.* 556. There was no consideration paid to the State for the right claimed, and when the public nature of the railway business is regarded, it is necessary in these cases to indulge the same presumption against irrevocable grants as are applied in cases involving taxation. *Stanislaus County v. Canal & Irrigation Co.* 192 *U. S. l. c.* 210-211.

The question of legislative grants is so admirably treated by Mr. Justice Holmes in *Wisconsin & Michigan Ry. Co. v. Powers*, 191 *U. S. l. c.* 385-387, that we quote at some length. In this connection it is said:

"The first and main question, then, is whether the act of 1893 purported to make an

irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions in this court. A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in *East Saginaw Manfg. Co. v. East Saginaw*, 13 Wall. 373 ("*Salt Co. v. East Saginaw*") ; S. C., 19 Michigan, 259. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. *Rector, etc., of Christ Church v. Philadelphia County*, 24 How. 300; *Tucker v. Ferguson*, 22 Wall. 527; *Grand Lodge, etc., of Louisiana v. New Orleans*, 166 U. S. 143. See *Tomlinson v. Jessup*, 15 Wall. 454, 459. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed. See further, *Welch v. Cook*, 97 U. S. 541, and *Manistee & Northeastern Railroad Co. v. Commissioner of Railroads*, 118 Michigan, 349, in which the state court deals with this very act.

It may be that a state, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognition or by affixing a seal. A state might abolish the requirement of consideration altogether for simple contracts by private persons, and, it may be that it equally might dispense with the requirement for itself. But the presence or absence of consideration is an aid to

construction in doubtful cases—a circumstance to take into account in determining whether the State has purported to bind itself irrevocably or merely has used words of prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant.

In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while no doubt in some cases between private persons the above distinctions have not been kept very sharply in mind, *Martin v. Meles*, 179 Massachusetts, 114, 117, it is clear that we should require an adequate expression of an actual intent on the part of the State to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See *Vicksburg, Shreveport & Pacific Railroad v. Dennis*, 116 U. S. 665, 668. Looking at the case in this way, then, we find no such adequate expression. No doubt the State expected to en-

courage railroad building, and the railroad builders expected the encouragement, but the two things are not set against each other in terms of bargain. See *Covington v. Kentucky*, 173 U. S. 231, 238, 239.

But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law. What we have said is enough to show that in our opinion the plaintiffs never had a contract, and therefore makes it unnecessary to consider the usual power to alter, amend or repeal charters, etc., contained in the constitution of Michigan, *Tomlinson v. Jessup*, 15 Wall. 454; *Covington v. Kentucky*, 173 U. S. 231; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, or a similar power in the general railroad law of 1873, of which the above acts of 1893 and 1897 were amendments through intervening amending acts."

The favors conferred by these acts possess neither the qualities of a contract nor of property, but were merely temporary permits to do what otherwise was not authorized. They were granted in the exercise of sovereign power and are subject to the direction of the State government which may modify, revoke or continue them as it may deem fit, subject to the limitation hereafter referred to.

The State had power to prevent these companies from coming into the State, or to impose as a condition of coming into, or doing business within its territory, any terms, restrictions or regulations it thought proper. The power to revoke or recall the permit once given is but the correlative and necessary consequence of the main power to prevent such corporations from coming into the State.

We stand upon firm ground in asserting this prerogative for the legislative department. To deny it is to depart from well settled principles. Since the decision in *Paul v. Virginia*, 8 Wall. 168, it has been uniformly held that a corporation is not a citizen within the meaning of the Fourteenth Amendment, which provides that no state shall * * * abridge the privileges or immunities of citizens. The effect of this decision, as universally applied, was to conclusively establish the power of the states to prevent the entrance of foreign corporations or name the conditions upon which these "outcasts" could enter or continue business within their limits, and herein consists the chief defect and fallacy of the position assumed and argued with much ingenuity by appellee. It overlooks, as it appears to us, that the subject with which we are now dealing, is not one pertaining to its primary and fundamental rights, and as to which no unlimited control has been vested in the State. It forgets, or by distinctions too refined for the practical administration of justice at-

tempts to destroy, this principal ground of distinction, and proceeds as if the action of the Legislature was an infringement of the natural and inalienable rights of the citizen, declared and guaranteed by the Constitution, instead of the exercise of a discretionary power against which no limit, except as hereafter referred to, has been set.

In treating of this subject, Mr. Justice McKenna, in *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, said:

"The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has often been declared by this court.

A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.

Bank of Augusta v. Earle, 13 Pet. 519, involved the power of the Bank of Augusta, chartered by the State of Georgia, and vested by its charter with a function of dealing in bills of exchange to exercise that function in the State of

Alabama. In passing on the question certain principles were declared which have never since been disturbed.

A contract of the corporation, it was declared, is the contract of the legal entity, and not of its individual members. Its rights are those given to it in that character, and not the rights which belong to its constituents citizens.

Its charter confers it powers and the means of executing them, and such powers and means can only be exercised in other states by the permission of the latter." * * *

"In *Paul v. Virginia*, 8 Wall. 168, 181, the dependent and derivative rights of corporations were again declared. *Bank of Augusta v. Earle* was quoted from, and it was again decided that a corporation is the mere creation of local law, and can have no legal existence beyond the limits of the sovereignty where created, and the recognition of its existence in other states and the enforcement of its contracts made therein depend purely upon the comity of those states.

'Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will

best promote the public interest. The whole matter rests in their discretion.'

"And it was also decided that a corporation did not have the rights of its personal members, and could not invoke that provision of section 2, article 4 of the Constitution of the United States, which gave to the citizens of each state the privileges and immunities of citizens of the several states. See, also, *Pembina Mining Co. v. Penn*, 125 U. S. 181; *Ducat v. Chicago*, 10 Wall. 410. And it has since been held in *Blake v. McClung*, 172 U. S. 239, and in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, that the prohibitive words of the Fourteenth Amendment have no broader application in that respect.

In *Blake v. McClung*, a Virginia corporation was denied the right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of a British corporation in the hands of a Tennessee court.

In *Orient Ins. Co. v. Daggs*, the right of the company, a Connecticut corporation, to limit by contract its liability to the actual damages caused by fire, notwithstanding a provision in the statute of Missouri making the measure of damages in case of total loss the value of the property stated in the policy, was denied.

See, also, *Pembina Mining Co. v. Penn*, 125 U. S. 181.

In *Hooper v. California*, 155 U. S., 648, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that State to procure insurance for a resident in the State from an insurance company not incorpo-

rated under its laws, and which had not filed a bond required by the law of the State. All preceding cases were cited, and it was assumed as settled 'that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state.' And the exception to the rule was stated to be 'only cases where a corporation created by one state rests its right to enter another and engage in business therein upon the Federal nature of its business.' "

In the recent case of *Hammond Packing Co. v. Arkansas*, 212 U. S. l. c. 343, it was said:

"As the State possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that if the State exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play. This being true, it follows that, as the power of the State to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the State, unless by the act of admission some contract right in favor of the corporation arose, which we shall hereafter consider, it follows that the prohibition against continuing to do business in the State because of acts done beyond the State was none the less a valid exertion of power as to a subject within the jurisdiction of the State."

POINT IV.

**The Act Assailed by This Suit is Valid, and is Not
Objectionable to the Provisions of the Federal
Constitution.**

The right of the State to enforce the provisions of the act in question was directly sustained by this court as early as 1876.

In *Doyle v. Continental Insurance Company*, 94 U. S., l. c. 540, Mr. Justice Hunt, in delivering the opinion of the court, said:

"The cases of *Bank of Augusta v. Earle*, *Ducat v. Chicago*, *Paul v. Virginia*, and *Lafayette Ins. Co. v. French*, establish the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field in the case last named.

The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. *Rector v. Philadelphia*, 24 How. 300; *People v. Roper*, 55 N. Y., 629; *People v. Commissioners*, 47 N. Y. 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey v. Pegues*, 16 Wall. 244; *Tomlinson v. Jessup*, 15 id. 454.

A license to a foreign corporation to enter a state does not involve a permanent right to remain. Subject to the laws and Constitution of the United States, full power and control over its territories, its citizens, and its business, belong to the State.

If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world.

The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the State is legal, is not in violation of the Constitution or laws of

the United States, it is quite out the power of any court to inquire what was the intention of those who enacted the law.

In all the cases where the legislation of a state has been declared void, such legislation has been based upon an act or a fact which was itself illegal.

The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its State court into the Federal courts, contrary to the provisions of the act of 1870, it shall be the duty of the Secretary of State immediately to cancel its license to do business within the State. If the State has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.

It is said that we thus indirectly sanction what we condemn when presented directly, to wit, that we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or cease to do business in this State. It gives the company the option. This is justifiable because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and without reference to the injustice, the prejudice or the wrong that is alleged to exist,

must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

Again in 1905, in *Security Mutual Life Insurance Company v. Prewitt*, 202 U. S., 246, the doctrine announced in the Doyle case, *supra*, was reaffirmed.

The statute under which the question there arose, was as follows:

"Before authority is granted to any foreign insurance company to do business in the State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

In the course of a lucid and luminous opinion, Mr. Justice Peckham said:

"A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are *Hooper v. California*, 155 U. S. 648; *Allgeyer v. Louisiana*, 165 U. S., 578, 583; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28; *New York Life Ins. Co. v. Cravens*, 178 U. S., 389, 395; *Hancock Mutual Life Ins. Co. v. Warren*, 181 U. S., 73.

Having the power to prevent a foreign insurance company from doing business at all within the State, we think the State can enact a statute such as is above set forth.

The question is, in our opinion, settled by the decisions of this court."

After carefully reviewing and properly defining the effect of the *Doyle* case, *supra*, and *Insurance Company v. Morse*, 20 Wall. 445, it was further said:

"In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the Federal court was void, whether made pursuant to a statute of the State providing for such agreement, or in the absence of such statute, but that the State, having power to exclude altogether a foreign insurance company from doing business within the State, had power to enact a statute which, in addition to providing for the

agreement mentioned, also provided that if the company did remove a case from the State to a Federal court, its right to do business within the State should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not."

The case of *Barron v. Burnside*, 121 U. S., 186, is then considered at length, and clearly distinguished from the one at bar. Continuing, the court said:

"If it had been the intention of the court in *Barron v. Burnside* to overrule the *Doyle* case, it was easy to have said so. Instead of that the opinion rests upon the ground of the agreement to be exacted as a condition of granting the permit and that the statute was not separable into parts, and it was held that the requirement of such a stipulation was void. It was not held that such a statute as the one of Kentucky now under consideration was void. Such statute exacts no agreement or stipulation in any form or in any part of the statute."

The cases of *Southern Pacific Co. v. Denton*, 146 U. S. 202, 207; *Barrow Steamship Co. v. Kane*, 170 U. S. 100; and *Blake v. McClung*, 172 U. S., 239, 255, are next carefully analyzed and declared not to touch the question under discussion.

In this connection the learned Justice says:

"In other words, the statute was regarded as exacting an agreement in advance not to remove a case, and such being the fact, it was held that the statute was void. The Texas statute is to the same effect as that of Iowa.

The most that can be contended for is that the Barron case holds that where the statute exacts a stipulation in advance, as a condition of granting a permit, and the statute is not separable into parts, the whole statute is void, and a provision for withdrawing the permit, if a case is removed, is not saved. That principle, as we have said, does not touch this case, as there is no exaction of a stipulation at any time."

It has not been decided that a statute which has no requirement for a stipulation or agreement not to remove is void, if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act, is immaterial.

Counsel for the companies, in their brief admit that the State 'has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute of expulsion would not be effected by the motives of the State in so doing—even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the State any longer than it chose to allow; and the

statute would not abridge any right of removal—for as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence.'

Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having permitted it once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a state to enact in advance that if a company remove a case to a Federal court its license shall be revoked.

We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a Federal court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the *Doyle* case, we think is good."

The very basis of the *Doyle* and *Prewitt* cases, *supra*, necessarily assumes that a license from the State to do business therein does not amount to a contract in respect to the right to sue and be sued in the Federal courts, and that an enforcement of the statute in question does not operate to impair the obligations of a contract, and

does not deprive such corporations of property without due process of law, or deny to them the equal protection of the laws.

These questions were of necessity decided in the manner suggested, or the constitutionality of those statutes could not have been affirmed.

In each of those cases the corporations had duly received from the State a grant under which it was authorized to and was doing business therein, and, in pursuance thereof, had established agencies, located offices, and made considerable expenditures of money in advertising and acquiring a large and profitable business in the State, all of which would be completely lost if the penalties provided by the statutes were inflicted.

For the purpose of those statutes, as in the one at bar, foreign corporations, although duly admitted to the State, were placed in a class different from domestic corporations, as the statutes there applied solely to foreign corporations.

That railway companies for the purpose of legislation, belong to a class as separate and distinct as insurance companies, admits of no question. (*Railway Company v. Mackey*, 127 U. S., 204; *Minneapolis Railway Company v. Beckwith*, 129 U. S., 26), and the same reasons which permit foreign insurance companies to be placed in a class different from domestic insurance companies warrant a similar classification of railroad companies.

These cases are not distinguishable from the one at hand upon the ground that the property and investment of the corporations there concerned were of a nature and amount different from appellee. Such a distinction is not practicable and could result only in confusion, since there could be no measure of what is entitled to protection except the vague and varying opinions of the differ-

ent judges. *United States v. Addyston Pipe and Steel Co.*, 54 U. S. App. 723.

Whether the property affected by a given statute is of the value of one dollar, or many millions, is immaterial in so far as protection is given property by the constitutional provisions invoked in these cases.

As against the complaints urged by appellee herein, the *Doyle* and *Prewitt* cases are fully fortified by other adjudicated cases in this court.

The chief ground relied upon in the trial court was that since appellee had qualified and been duly admitted to the State, it is entitled to the "equal protection of the laws," and that by reason thereof it could not constitutionally be subjected to regulations different from those imposed on domestic corporations. It was said that, notwithstanding the act in question, domestic corporations can still bring suits and remove cases to the Federal court when what is commonly called a Federal question, and the requisite amount, is involved, and that this operates to deny appellee the protection afforded domestic corporations, and is, therefore, offensive to the Constitution.

Again, appellee overlooks that its right to transact an intrastate business is not inherent and inalienable, but is exercised by sufferance and at the will of the State.

The power to prevent a corporation from coming into the State, or to impose as a condition of coming into, or doing business therein, such terms, restrictions and regulations as it deems proper, of necessity embraces the right to place it in a class different from domestic corporations, and to impose upon the one a condition not required of the other, since the lesser is necessarily contained in the greater power. *Blake v. McClung*, 172 U. S. 239; *Orient Insurance Co. v. Dadd*, 172 U. S. 557.

The distinction between a domestic and foreign cor-

poration, and the differences in their rights, and the power exercised by the State in respect to each is broad enough to authorize a classification and separate regulations in so far as the Constitution applies, and for this purpose it is immaterial that a foreign corporation has been duly admitted to the State.

In speaking upon this subject, Mr. Justice Holmes, in *National Council U. A. M. v. State Council*, 203 U. S. 163, said:

"The conclusion is drawn that the restrictions upon the defendant which flow from the charter to the plaintiff amount to a denial of the equal protection of the laws of Virginia to a person within its jurisdiction. But the power of the State as to foreign corporations does not depend upon their being outside of its jurisdiction. Those within the jurisdiction, in such sense as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws. A single foreign corporation, especially one unique in character, like the National Council, might be expelled by a special act. It equally could be restricted in the more limited way."

In *Central Loan & Trust Company v. Campbell*, 173 U. S., 84, Mr. Justice White said:

"That the distinction between a resident and a non-resident is so broad as to authorize a classification in accordance with the suggestion just made is conceded, and, if it were not, is obvious. The reasoning then is, that, although the difference between the two classes is adequate to support the allowance of the remedy in one

case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is exacted in the other. The power, however, to grant in the one and deny in the other of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding on the one hand, the power to classify residents and non-residents, for the purpose of the writ of attachment, and then from this concession to argue that the power does not exist, unless there be something in the cause of action, for which the attachment is allowed to be issued, which justifies the classification. As, however, the classification depends upon residence or non-residence, and not upon the cause of action, the attempted distinction is without merit."

In *Board of Education v. Illinois*, 203 U. S. 556, in upholding the validity of a tax assessed against a foreign corporation in pursuance of the statute which exempted domestic corporations from the imposition of the tax, Mr. Justice McKenna said:

"The questions raise important considerations, but we may pass them, because the contention that the act of 1901 is invalid encounters an insuperable obstacle in the power of the State to classify objects of legislation and discriminate between classes. This power is not unconstitutionally exercised by legislation which exempts the religious and educational institu-

tions of the State from an inheritance tax and subjects educational and religious institutions of other states to the tax. Regarding alone the purposes of the institution, no difference may be perceived between them, but regarding the spheres of their exercise, and the benefits derived from their exercise, the difference is conspicuous."

And in the course of the opinion, the learned Justice quoted from the Supreme Court of Illinois, as follows:

"The law-making power would find many weighty considerations authorizing the classification of foreign and domestic corporations into different classes and justifying the creation of liability on the part of foreign corporations to pay a tax on the right to take property by descent, devise or bequest, under the laws of the State, and at the same time leaving the right of a domestic corporation so to take free of any such exaction."

For reasons which we notice under Point V, appellee is in no position to invoke in this action the doctrine of equal protection of the laws.

POINT V.

Upon the Facts Stated Appellee is in No Position to Invoke the Doctrine of a Violation of the Alleged Contract.

There is but one remaining question which we feel called upon to discuss, that being the one pertaining to the alleged contract based upon certain provisions of the general laws. In this connection, we respectfully call at-

tention to certain errors in the opinion of the distinguished circuit judge as to these statutory provisions. For the basis of his opinion, the learned Judge said (Rec. p. 33):

"The statute further provided that such non-resident corporation 'shall be subject to all regulations and provisions of law governing railroads in this State. And may sue and be sued in all cases and for the same causes and in the same manner, as a corporation of the State might be sued.'"

Reference to the act discloses that the provision applicable to appellee, when correctly quoted, is as follows:

"Or any railroad company duly organized and existing under the laws of an adjoining state of the United States, may extend construct, maintain and operate its railroad into and through this State, and for that purpose shall possess and exercise all the rights, powers and privileges *conferred by the general laws of this State upon railroad corporations organized thereunder*, and shall be subject to all the duties, liabilities and provisions of the laws of this State concerning railroad corporations, as fully as if incorporated in this State."

In a different part of the act, having no application to companies such as appellee which *constructed or purchased* a line of railway, but specifically limited to a "corporation of another state *being the lessee of a railroad in this State*," it was provided:

"And may sue and be sued in all cases and for the same causes, and in the same manner as

a corporation of this State may sue or be sued, if operating its own road."

The opinion further recites (Rec. p. 33):

"In 1891 the Legislature enacted that any corporation for pecuniary profit, created under the laws of another state, shall, before allowed to continue business, file with the Secretary of State a copy of its articles of incorporation, and a statement as to its stock and other matters, and *pay for* and receive a certificate from the Secretary of State, showing that it has the right to do business." (The italics are our own.)

The act referred to (see Appendix, pp. 55-59) in this connection, while requiring all other foreign corporations, as a condition of entering or continuing business in the State, to pay an incorporation tax or fee, *by express terms, exempted from such payment* all such railway companies as appellee, which had theretofore built their lines of railway into or through the State, and no such payment was, in fact, made by such companies. The act did require, however, that all foreign corporations, including railroad companies, then doing business in the State, should file a copy of their charter and receive a certificate from the Secretary of State evidencing *in the courts of this State* their authority to do business.

The act further provided that on compliance with its terms:

"And such corporation shall be subjected to all the liabilities and restrictions and duties which are or may be imposed upon corporations of like character, organized under the general laws of this State, and *shall have no other or greater powers.*"

Upon these provisions that foreign corporations shall have no other or greater, but the same rights as are conferred by the general laws of this State upon domestic corporations, appellee bases its alleged contract, and asserts an irrevocable right to bring suits and remove cases to the Federal courts in all cases where such right is conferred upon it by the laws of the United States.

To appreciate the rank of inconsistency of this claim, it is not necessary to look beyond the bill of complaint.

In apparent seriousness appellee alleges that it and the State entered into a valid contract by the terms of which its rights of recourse to the Federal courts were made identical with those of domestic corporations, and the two placed on a basis of *absolute parity* in that respect.

With the same apparent earnestness it alleges, in another part of the bill, that it has exercised powers in this respect which a domestic corporation could not exercise, and has removed cases to the Federal court which could not have been removed by domestic corporations had they, instead of appellee, been the defendants therein, and that in threatening to revoke its authority because it has exercised these *other* and *greater* powers, the State is about to violate the agreement by which its rights and those of domestic corporations are made the same.

When epitomized, the contention is:

Major premise: Its rights to resort to the Federal court are no other greater than, but identical with the rights of domestic corporations in that respect, and those rights are given and guaranteed by contract with the State.

Minor premise: The State threatens to punish it for exercising rights *other* and *greater* than those given and guaranteed domestic corporations by the contract.

Conclusion: The State is threatening to violate said contract.

The misconception consists in the contention, on the one hand, for the equality of rights in this respect, and then from this to argue for unequal and superior rights. The one necessarily excludes the other. If this subject was within the terms of the contract, appellee is as firmly bound as is the State, and cannot ask a court of equity to support it in the violation of the terms.

According to the bill of complaint, the basis of appellant's threatened action is that appellee has removed from the Missouri to the Federal courts certain suits upon the *sole* ground that the plaintiffs therein were citizens of Missouri, while it was not. Had these, or other suits in which citizens of Missouri were plaintiffs, been filed against a domestic corporation, the same could not have been removed. How, then, can appellee consistently contend that its alleged *equality* contract is violated by the threatened action of appellant.

Conceding for the moment that appellee has a contract which guarantees it the *same rights* in this respect as domestic corporations, it is obvious that in this suit appellee is in no position to invoke, or have considered, the question of the impairment of the obligations of a contract or the constitutional guaranty of equal protection of the laws. Since it admits that the acts on its part, of which the State complains in this particular case, and because of which appellant threatens to revoke its authority, are acts *other* and *greater* than those permitted to be performed by domestic corporations, the questions referred to are not involved, and a decision thereon is not necessary and would not be responsive to any issue tendered.

It is not sufficient to reply that under this act appellant might have attempted this action if it had done some-

thing instead of what it do. When such a case is presented will be time enough to consider it.

Courts will not consider the constitutionality of a statute except upon the facts necessarily involved in the controversy. While they cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in any such weighty matters collaterally nor in *moot* cases.

In *Ex parte Randolph*, 2 Brock, U. S. l. c. 471, Mr. Justice Barbour, in treating of this subject, said:

"The decision of a question of this sort is certainly the highest and most solemn function which the judiciary could be called upon to perform; for, as was said with sententious brevity by the court, in one of the earliest cases on this subject, it involves the inquiry whether the will of the representatives, as expressed in the law, is, or is not, in conflict with the will of the people, as expressed in the Constitution. Great, however, as is the responsibility involved in this exercise of judicial power, I should meet it without difficulty, if it were necessary to the decision of this cause. But I fully concur in the sentiment of counsel, that whilst, on a proper occasion, it ought to be met with firmness, on the other hand, it is the part of wisdom, to decline the decision of such a question when not necessary.

From the view which I have taken of this case, I do not consider it necessary, and shall therefore pass it without further remark."

And in the same case, at page 478, Mr. Chief Justice Marshall said:

"No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

In the *Encyclopedia of Law and Procedure*, Vol 8, p. 798, it is said :

"It is a well settled principle that the constitutionality of the statute will not be determined in any case unless such determination is absolutely necessary in order to determine the merits of the suit to which the constitutionality of such statute has been drawn in question, and then only where the part of the statute alleged to be unconstitutional is involved in the controversy and the remaining portion is incomplete and inoperative in itself."

In the *Am. and Eng. Ency. of Law*, Vol. 6, at page 1084, it is said :

"A question involving the constitutionality of a statute should be determined only when it is impossible to dispose of a cause on its merits otherwise, and a court will be especially reluctant to investigate or determine the constitutionality of a statute on preliminary motions or on application for provisional remedies, such as motions to strike out part of a complaint as irrelevant, or a proceeding to determine the right

to costs in a case, or on application for a preliminary injunction."

The authors cite a multitude of cases which add their endorsement to the doctrine announced in *Ex parte Randolph*, *supra*.

Neither is appellee entitled to the decision of this court on such questions because of its effect upon the rights of corporations not parties to this suit.

This principle is correctly announced in *Watson's Seminary vs. County Court*, 149 Mo. 72, as follows:

"We are not called upon to decide or determine the rights of persons who contribute to the school property. It is not our duty to decide any constitutional question affecting their rights until they are in court and the issue is directly or necessarily involved." (*People vs. Railroad*, 89 N. Y. 92.)

In *Patterson vs. Bark Eudora*, 190 U. S. l. c. 176, Mr. Justice Brewer disposes of a question not necessarily involved in the following manner:

"No question is before us as to the applicability of the statute to contracts of sailors for service wholly within the State. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a State, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single State and in an ocean voyage."

In *Supervisors vs. Stanley*, 105 U. S. 311, Mr. Justice Miller said:

"What legal interest has he in a question which only effects others? Why should he invoke the protection of the acts of Congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?"

In *Hatch vs. Reardon*, 204 U. S. l. c. 160, the court had under consideration a similar question, and in this connection Mr. Justice Holmes said:

"But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the State court may read into general words, or how far it may sustain an act that partially fails."

What right has appellee to inquire as to whether the rights of that class of foreign corporations which exercise in Missouri only such privileges as belong to domestic

corporations are violated by the act in question? What relief can be afforded it upon its alleged contract when confessedly it has incurred the State's wrath by reason of exercising powers *other* and *greater* than those possessed by domestic corporations? How does the court know that had appellee exercised *only* the rights which domestic corporations possess in respect to the right to sue and be sued in the Federal Courts, that appellant would attempt to revoke its authority?

This certainly cannot be presumed if, as appellee contends, such an act would constitute a trespass and amount to the enforcement of an invalid and unconstitutional law. If such action on the part of appellant would have this effect, the court cannot presume that the statute in question would be so construed and applied.

If the act in question, when construed to prevent foreign corporations from resorting to the Federal Courts in such cases as domestic corporations have that right, is *for that reason* unconstitutional, then it cannot be presumed that such was the intention of the legislature, or that the act will be so construed, or that under such circumstances it would have been so applied as against appellee.

A legislative intent to violate the Constitution can never be assumed, if the language of the statute can be satisfied by a contrary construction, and officials are presumed to construe and apply statutes accordingly. General terms should be so limited in their application as not to render the whole statute invalid as being in conflict with the organic law. It will always be presumed that the legislature intended exceptions to general language which would avoid results of this character, and courts will regard as excepted by necessary implication from even the most express and absolute general provisions all cases to which a statute cannot constitutionally apply.

In such cases the spirit prevaileth over the letter,

"for the letter killeth, but the spirit maketh alive." The application of this rule requires that if it is necessary to give a statute a restricted construction, or make certain exceptions, in order to make it harmonious with the Constitution, such a construction will be adopted, because, as said in *Grenada County Supervisors vs. Brogden*, 112 U. S. l. c. 268:

"But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution. Cooley Constitutional Law, 184-5; *Newland vs. Marsh*, 19 Ill. 376, 384; *People vs. Supervisors, etc.*, 17 N. Y. 235, 241; *Colwell vs. May*, 4 C. E. Green (19 N. J. Eq.) 245, 249. And such is the rule recognized by the Supreme Court of Mississippi, in *Marshall vs. Grimes*, 41 Miss. 27, 31, in which it was said: 'General words in the act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the act unconstitutional. But, if possible, a construction should be given to it that will render it free from constitutional objection, and the presumption must be that the legislature intended to grant such rights as were legitimately within its power.' Again, in *Sykes vs. Mayor, etc.*, 55 Mississippi, 115, 143: 'It ought never to be assumed that the law-making department of the

government intended to usurp or assume power prohibited to it. And such construction (if the words will admit of it) ought to be put on its legislation as will make it consistent with the supreme law.' "

An examination of the decisions of the Missouri State courts establishes that from its earliest history this rule has been, and yet is, uniformly applied when the acts of the Missouri Legislature are interpreted.

As an illustration of this, in *State vs. Moody*, 202 Mo. l. c. 127, the Supreme Court of Missouri said:

"By such elimination and construction this section will be in perfect harmony with the other two; and all three, taken and considered together, will make the law uniform in its operation, as was evidently the intention of the Legislature. It was certainly not the intention of the Legislature, that a resident of the city of St. Louis should pay more for a hunter's license applied for and taken out in that city than should a resident of a county for such license applied for and obtained in such county; for such a law would be clearly unconstitutional. 'A legislative intent to violate the Constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction.' (Endlich on interpretation of Statutes, Sec. 178.)

'It is our duty to uphold the act, unless it plainly and clearly violates the fundamental law of the State, and, if its language is susceptible of a meaning that will remove the objections to its validity, such an interpretation should be

adopted.' (State ex rel. vs. Pike County, 144 Mo. 275; Milwaukee Industrial School vs. Supervisor, 22 Am. Rep. 702-711.)

By striking out the words indicated, as having been inprovidently inserted, the sections under consideration are readily understood, and of practical effect. 'In pursuing this course, we do but follow well-approved precedents and allow the reason of the law to prevail over the letter; 'for the letter killeth, but the spirit maketh alive.' (Bingham vs. Birmingham, 103 Mo. 345; State ex rel. v. Pike County, *supra*; St. Louis vs. Dorr, 145 Mo. 466.) In Bingham vs. Birmingham, *supra*, eight words were stricken out of a statute in order to conform to the plain intent of the Legislature to make all sections of the law harmonize."

In fact, the principle thus announced is so uniformly established that it can be said that the omission of a proviso, making exceptions which are essential to the validity of the act, may well be attributed to the well known construction given by the courts, which confines the operation of a new statute to cases to which it can constitutionally apply. Due regard, therefore, should be given these considerations when it is necessary for another court to pass upon the validity of our legislative acts.

The Missouri courts have had no opportunity to construe the statute in question, but the same deference should be shown their well settled and uniformly applied rules of construction as would be accorded their decision after they had applied such rules and construed the statute accordingly

It cannot be presumed that on this statute the Missouri courts will violate such rules which, as before stated,

have now become a part of our law. When they do so will be time enough to complain. "The Winnebago," 205 U. S. 361.

In this connection this court, in *Hammond Packing Company vs. Arkansas*, 212 U. S. 322, held that where the State court has decided that the provisions of the statute relate to both domestic and foreign corporations, a foreign corporation cannot complain that the contract between it and the State admitting it, on payment of a franchise tax, to do business on the same terms as a domestic corporation, has been impaired by the revocation of its permit for violation of such statute.

The provisions of the act assailed by appellee are general in terms, and if it should be held, as appellee contends, that at the time of its enactment Missouri had in force another statute under which appellee had, for a good consideration, secured an irrevocable right to sue and be sued in the Federal Court in *all cases where domestic corporations can sue and be sued* (which the State denies), then, in accordance with the rules heretofore announced, this statute *should not be declared unconstitutional, but should be construed in such a manner as to limit the right of a foreign corporation to resort to the Federal Court only in such cases as the domestic corporation can sue and be sued in such court when a citizen of Missouri is the opposing party.*

If this construction were applied, the chief objections urged by appellee (which are beside this case) would be entirely removed, but, notwithstanding this, appellee would be entitled to no relief, since, according to the bill, the basis of appellant's threatened action is the removal of cases upon grounds not available to domestic corporations, and it is therefore in no position to raise such questions and a construction of the act becomes unnecessary and should be left to the State courts. But in view of the

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reasons assigned under the next following point this is a somewhat unnecessary mode of discussion, since a limited construction is not essential to the validity of the act in question.

POINT VI.

The Right to Sue and Be Sued in the Federal Court was Not a Subject Embraced Within the Alleged Contract.

Appellee has no contract which covers the right asserted. The right which it has exercised in this respect was conferred by the laws of the United States, and was not a subject of contract.

In pursuance of this right, derived from another jurisdiction, it exercised privileges not enjoyed by domestic corporations, and such as it was beyond the power of the State to confer on domestic corporations.

When suing or being sued by a citizen of Missouri, it could, for the one reason that the other party was a citizen of Missouri, remove the causes to the Federal Court, when, under the same conditions, a domestic corporation could not remove such suits.

That this right is not seriously regarded by appellee, as included within the alleged equality contract, is manifest from the allegations of the bill that it has resorted to the Federal Court in cases where domestic corporations could not do likewise. In fact, *the case at bar* was instituted in the Federal Court upon the ground that appellant is a citizen of Missouri, while a domestic corporation could not, upon the same ground, exercise such power.

It is too obvious to admit of discussion that the right asserted was not comprehended by the provisions relied upon, and was not within the contemplation of the parties at the time of the passage or acceptance of the act. If,

when this statute was enacted, the Legislature had in view and intended to include the right to sue and be sued in the Federal Courts and to bind itself on that subject, and to place foreign corporations upon a basis identical with domestic corporations, would it not, in providing that foreign corporations shall have no other or greater rights than domestic corporations, have made other provisions to secure and make effectual that equality by inflicting penalties on all foreign corporations which removed causes to the Federal Courts in cases and on grounds where, under the laws of the United States, a domestic corporation could not do likewise. Without this, or some similar provision, it was utterly impossible to place such corporations on a basis of equality, and it is unreasonable to presume that if the Legislature had in mind and was dealing with the subject, it would have left the matter in this insufficient condition.

Until 1907 the State of Missouri had enacted no legislation touching the exercise of this right, and had done nothing in the way of attempting to either confer or abridge it. On this subject its laws were silent and its politics unannounced.

Under such conditions appellee entered the State, and for years continued to exercise in this regard a right on which the Legislature had indicated no course, and one in the enjoyment of which appellee invoked neither the State law nor contractual right, but looked solely to the law of another jurisdiction.

It is the universal rule that in construing public grants the language used should be strictly construed in favor of the public and against the grantee, and that only such power and rights can be claimed under the grant, as are clearly comprehended by the words of the act, or derived therefrom by *necessary* implication, regard being had to the object of the grant. Every ambiguity and

doubt arising out of the terms used by the Legislature must be resolved in favor of the public.

The general rule is well stated by Mr. Justice Swayne, in *Fertilizer Company vs. Hyde Park*, 97 U. S. l. c. 666:

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. *Silence is negation and doubt is fatal to the claim.* This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

The rigid application of this recognized rule is particularly demanded where, in cases like this, the validity of a statute is said to also depend upon the construction placed upon the alleged grant. *United States vs. Central Pacific Ry. Co.*, 118 U. S. 235.

By the very provisions relied upon to constitute the contract foreign railway companies were given only "the rights, powers and privileges conferred by the general laws of this State upon railway corporations organized thereunder." (Act of 1870.)

Such rights as domestic corporations have to bring suits or remove causes to the Federal Court were not conferred "by the general laws of this State." The laws of this State have never conferred, as indeed they could not, any rights in this respect upon domestic corporations, and since foreign corporations were given only such rights as are conferred by the laws of this State upon domestic corporations, it follows, as an unavoidable consequence, that no such right was included in the grant. Neither this

provision, nor the general license to do business in the State, affords any basis for an implied grant of the right in question.

In determining whether an asserted right is necessarily implied in an express grant, consideration must always be given to the object of the main grant, and the right cannot be claimed by implication, unless it appears that such right is absolutely essential to the exercise and enjoyment of the grant expressly conferred. It is not sufficient that the right claimed would be convenient or beneficial.

In the case at bar, the object of the grant was to enable appellee to construct and operate a line of railway in Missouri. The right to sue and be sued in the Federal Court is in no manner essential to the accomplishment of this object, nor necessary for the enjoyment of any rights conferred. This proposition is settled by the *Doyle* and *Prewitt* cases, *supra*, and *Cable vs. U. S. Life Insurance Co.*, 191 U. S. 288.

The courts of Missouri are open to appellee for the protection of all its rights and the redress of all wrongs, and such courts will, when necessary, as stated in the opinion rendered in this case by the learned Circuit Judge, declare void all statutes which are in conflict with the Constitution of either the State or the United States.

From decisions of the State courts, appellee can prosecute to the Federal Courts its writ of error, if it is aggrieved by such decisions. The right is not denied by the act in question, and appellee's claim to the privilege asserted in this action is untenable.

Railroad Cases, 116 U. S. 307; *Freeport Water Company vs. City*, 180 U. S. 587; *Providence Bank vs. Billings*, 4 Pet. 514; *Life Insurance and Trust Company vs. Debolt*, 16 How. (U. S.) 435.

POINT VII.

**The Case of AMERICAN SMELTING COMPANY
V. COLORADO, 204 U. S. 103, Which in the
Circuit Court Was Treated as Decisive of the
Case at Bar, is Not in Point.**

The case of *American Smelting Co. vs. Colorado*, 204 U. S. 103, upon which appellee relied in the circuit court, and which was treated as decisive by the learned Circuit Judge, is so dissimilar from the case at bar that it affords no basis for appellee's contention, and is not in point. *Hammond Packing Co. vs. Arkansas*, 212 U. S. 322. After finding that the subject of taxation was one within the terms of the original contract, the court in that case said:

"It is unnecessary to refer to the many cases cited by both parties hereto; some of them refer to the question as to the nature of such tax, *while others decide upon the facts appearing in them whether there was a contract or not* * * * and in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, *it must always rest for its support in the particular case upon the construction to be given the act.*"

The opinion of a court must always be read in connection with the facts upon which it is based.

It is apparent that the subject upon which the State of Colorado enacted the legislation assailed in that case was one clearly within the contemplation of the parties when the act under which plaintiff in error entered the

State was passed, and that the right to equal and uniform taxation was included in the grant. At the time the grant was made, the subject of taxation was wholly within the control of the State, governed exclusively by the laws of that State, and one upon which the State had fully legislated and made clear its future policies. It had made adequate provision by its statute to secure and make effectual an equality among domestic and foreign corporations in the matter of taxation, thus evidencing its intention to include that subject within its contract. Instead of being silent on the subject, the State had duly spoken and plaintiff therein had fully recognized and abided the State laws governing this subject, and had not asserted or attempted to exercise greater powers in that regard than domestic corporations. The plaintiff there claimed only an equality under the laws of Colorado, and its contract and not an *inequality* in its favor acquired under the laws of another jurisdiction.

In that case plaintiff had also paid for its grant a consideration amounting to about \$15,000. Emphasis is given to this fact in the opinion at pages 112, 113.

In the case at bar, no such consideration was paid, and that this is a matter of importance when determining the question here presented is evident. *Newton vs. Commissioners*, 100 U. S. l. c. 561; *Christ Church of Philadelphia vs. Commonwealth*, 24 How. 300; *Wisconsin Railway Co. vs. Powers*, 191 U. S. 379; *State vs. Gilmore*, 141 Mo. 513.

CONCLUSION.

The State of Missouri has ever been liberal in its treatment of foreign corporations, but has never relinquished its power of control, and it only asks that in this respect its sovereign rights, as heretofore recognized by

this court, be upheld, and that the decree rendered in the circuit court be reversed, with instructions that the injunction be dissolved and the bill dismissed.

Respectfully submitted,

Respectfully submitted,

ELLIOTT W. MAJOR, Attorney-General of Missouri,

CHAS. G. REVELLE, Asst. Att'y-Gen. of Missouri,

JAMES T. BLAIR, Asst. Att'y-Gen. of Missouri,

Counsel for Appellant.

APPENDIX.

ACT OF MARCH 13TH, 1907.

AN ACT to provide for the revoking of the license, right and authority of any foreign or non-resident railway corporation, of whatever kind, to do business from a point in this State to a point in this State, whenever such corporation shall remove certain suits or proceedings to any Federal court or bring certain suits or proceedings in any Federal court; to provide a penalty on any such corporation for doing, attempting to do, or holding itself out to do business from a point in this State to a point within this State without a license, permit or certificate of authority therefor first had and obtained, or to do such business after its license, permit or certificate of authority has been revoked, and to prevent any such corporation from doing or attempting to do business from a point in this State to a point in this State without first having obtained a license, permit or certificate of authority therefor.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other state, territory or country, and doing business as a carrier of freight or passengers from one point in this State to another point in this State, under the laws of this State, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any

such corporation to enter or to do business in this State, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this State to another point in this State shall forthwith be revoked by the Secretary of State, and its right to do such business shall cease, and the Secretary of State shall publish such revocation in some newspaper of large and general circulation in the State, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this State to another point in this State, or to do business as a carrier of passengers or freight of any kind from one point in this State to another point in this State at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this State to a point without this State, or from a point without this State to a point within this State, or from making what are known as interstate shipments and transportation.

Sec. 2. If any corporations included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point in this State to another point in this State, without a license, permit or certificate of authority therefor first had and obtained from the State of Missouri—to be issued by the Secretary of State—or after its license, permit, right or certificate of authority to carry passengers or

freight of any kind from one point in this State to another point in this State, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the State of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suit to be brought therefor in any court of competent jurisdiction by the Attorney-General, or the prosecuting attorney of any county in the State in which such offense shall have been committed; and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the Governor may, whenever he shall deem it necessary, appoint special counsel to assist the Attorney-General or any prosecuting attorney to enforce or carry out the provisions of this act.

Sec. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed.

Approved March 13, 1907.

(Laws of Missouri of 1907, p. 174.)

ACT OF APRIL 21ST, 1891.

AN ACT to require every foreign corporation doing business in this State to have a public office or place in this State at which to transact its business, subjecting it to certain conditions, and requiring it to file its articles or charter of incorporation with the Secretary of State, and to pay certain taxes and fees thereon.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this State, or to continue business therein if already es-

may do business with such loan, building and loan or bond investment companies: *Provided*, that the requirement of this act to pay incorporating tax or fee shall not apply to railroad companies which have heretofore built their lines of railway into or through this State; and, *provided*, further, that the provisions of this act are not intended to and shall not apply to "drummers" or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-resident.

Sec. 3. Every corporation for pecuniary profit, formed in any other state, territory or country, now doing business in or which may hereafter do business in this State, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than \$1,000, to be recovered before any court of competent jurisdiction; and it is hereby made the duty of the Secretary of State, immediately after August 1, of the year 1891, and as often thereafter as he may be advised that corporations are doing business in contravention to this act, to report the fact to the prosecuting attorney of the county in which the business of such corporation is located, and the prosecuting attorney shall, as soon thereafter as is practicable, institute proceedings to recover the fine herein provided for, which shall go into the revenue fund of the county in which the cause shall accrue; in addition to which penalty, on and after the going into effect of this act no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether arising out of contract or tort: *Provided*, that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this State; nor to "drummers" or traveling salesmen so-

liciting business in this State for foreign corporations which are entirely non-resident.

Sec. 4. This act does not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to that character of corporations, but apart from the insurance laws, all acts and parts of acts inconsistent with this act are hereby repealed.

Sec. 5. The fact that there is now no law governing foreign corporations, as above provided for, creates an emergency within the intendment of the Constitution; wherefore this act shall take effect from and after its passage.

Approved April 21, 1891.

(Laws of Missouri of 1891, p. 75.)

ACT OF MARCH 2ND, 1869.

AN ACT to authorize the consolidation of Railroad Companies in this State with companies owning connecting railroads in adjoining states.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That any railroad company organized under the general or special laws of this State, whose track shall at the line of the State connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company, for the consolidation of the stock of the respective companies whose tracks shall be so connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations, as may be mutually agreed between them,

in accordance with the laws of the adjoining state in which the road is located, with which connection is thus formed.

Sec. 2. Such consolidation shall not be made, however, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated, at some meeting called expressly for that purpose, or by the approval of the same by the holders of the same amount of stock in each of said companies, in writing, and signed by them.

Sec. 3. When the terms of said consolidation shall have been agreed upon, as above stated, and approved in one or the other of the modes above set forth, it shall be competent for the board of directors in each of said connecting companies to carry the same into effect, and adopt by resolution a new corporate name for the company, which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of the consolidation; and a copy of the said consolidation agreement and the resolutions of consolidations, and the name adopted for the new company, shall be filed with the Secretary of State, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company; provided, that whenever at any place on the line of this State, two or more railroads in this State are competing for the business, to or from any railroad in an adjoining state, and a consolidation of either of such competing roads, with the road in an adjoining state, would diminish or prevent such competition, then, and in such case, consolidation shall not be permitted under this act, and in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall

have the right to run their freight cars, without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads, on fair and reasonable terms; and the same may be enforced by appropriate legislation; *and provided further*, that the State reserves to itself the right to guarantee to any road that may hereafter be built to any such point, the right to make a fair contract for the transportation of freight and passengers, with such consolidated road, and in case any such railroad company shall consolidate, or attempt to consolidate with a connecting road, contrary to the provisions of this act, any person or party aggrieved, may bring action against them, in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise.

Sec. 4. Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this State, which may be thus consolidated with one in the adjacent state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place.

Sec. 5. This act shall take effect and be in force from and after its passage.

Approved March 2, 1869.

(Laws of Missouri, 1869, p. 75.)

ACT OF MARCH 24TH, 1870.

AN ACT to amend chapter sixty-three of the General Statutes, entitled "of railroad companies," so as to au-

thorize the consolidation, leasing and extension of railroads.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Any two or more railroad companies in this State, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the Secretary of State, when the consolidation shall be considered duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company under such cor-

porate name as may have been adopted; *provided, however*, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction; *and provided*, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise. And in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad companies shall consolidate their roads, under the provisions of this act, they shall each file with the Secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders thereof, to be called for the purpose of considering the same.

Sec. 2. That the said chapter is hereby amended by adding thereto an additional section, to wit: Section 52.

Any railroad company heretofore, incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise aid such company in the construction of its railroad within or without the State, for the purpose of forming a connection of the last mentioned road, with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the State, may extend into the adjoining state, and for that purpose may build or buy or lease a railroad in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state or of the United States, may lease or purchase all or any part of a railroad with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this State, and constructed, owned or leased by any other company if the lines of the road or roads of said companies are continuous or connected at a point either within or without this State, upon such terms as may be agreed upon between said companies, respectfully; or any railroad company, duly incorporated and existing under the laws of an adjoining state of the United States may extend, construct, maintain and operate its railroad into and through this State, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this State upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this State concerning railroad corporations as fully as if incorporated in this State; *provided*, that no such aid shall be furnished, nor any purchase, lease, sub-letting, or arrangements perfected until a meet-

ing of the stockholders of said company or companies of this State, party or parties to such agreement, whereby a railroad in this State may be aided, purchased, leased, sub-let or affected by such arrangement shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof signed by the president and secretary of said company or companies shall have been filed in the office of the Secretary of State; *and provided further*, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this State, or make arrangements for operating the same as provided in this act, or shall extend its railroad into this State, or through this State, such part of said railroad as is within this State shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this State; and a corporation in this State leasing its road to a corporation of another state shall remain liable as if it operated the road itself, and a corporation of another state being the lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue and be sued, in all cases and for the same causes, and in the same manner as a corporation of this State might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations, shall discharge the other; and a corporation of another state being the lessee as aforesaid, or extending its railroad as aforesaid into or through this State, shall establish and maintain an office or offices in this State, at some point or points on

the line of the road so leased or constructed, and operated, at which legal process and notice may be served as upon railroad corporations of this State.

Sec. 3. Section twenty-two of the chapter aforesaid shall be amended to read as follows: Section 22. Any county court, city council or trustees of any town refusing to perform any of the duties required of them by this chapter, may be proceeded against by writ of mandamus, to be sued out of the circuit court of the county.

Sec. 4. Any railroad company in this State shall have the right to take and hold all necessary grounds for depots and side tracks, and if the title thereto cannot be secured by agreement with the owners thereof, or if from any other cause the title may not be secured, such company may proceed to condemn the same in the same manner and with the same effects as is now provided by chapter sixty-six of the General Statutes of the State of Missouri, entitled "Of the appropriation and valuation of lands taken for telegraph, macadamized, graded, plank and railroad purposes," and of any act amendatory thereof.

Sec. 5. Section twelve of the chapter aforesaid is hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its passage.

Approved March 24, 1870.

(Laws of Missouri, 1870, p. 89.)

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FILED
MAR 4 1910
JAMES M. MCKENNEY,
Clerk.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1909.

JOHN E. SWANGER, (Succeeded by CORNELIUS
ROACH), Secretary of State of the State of
Missouri, *Appellant*,

vs.

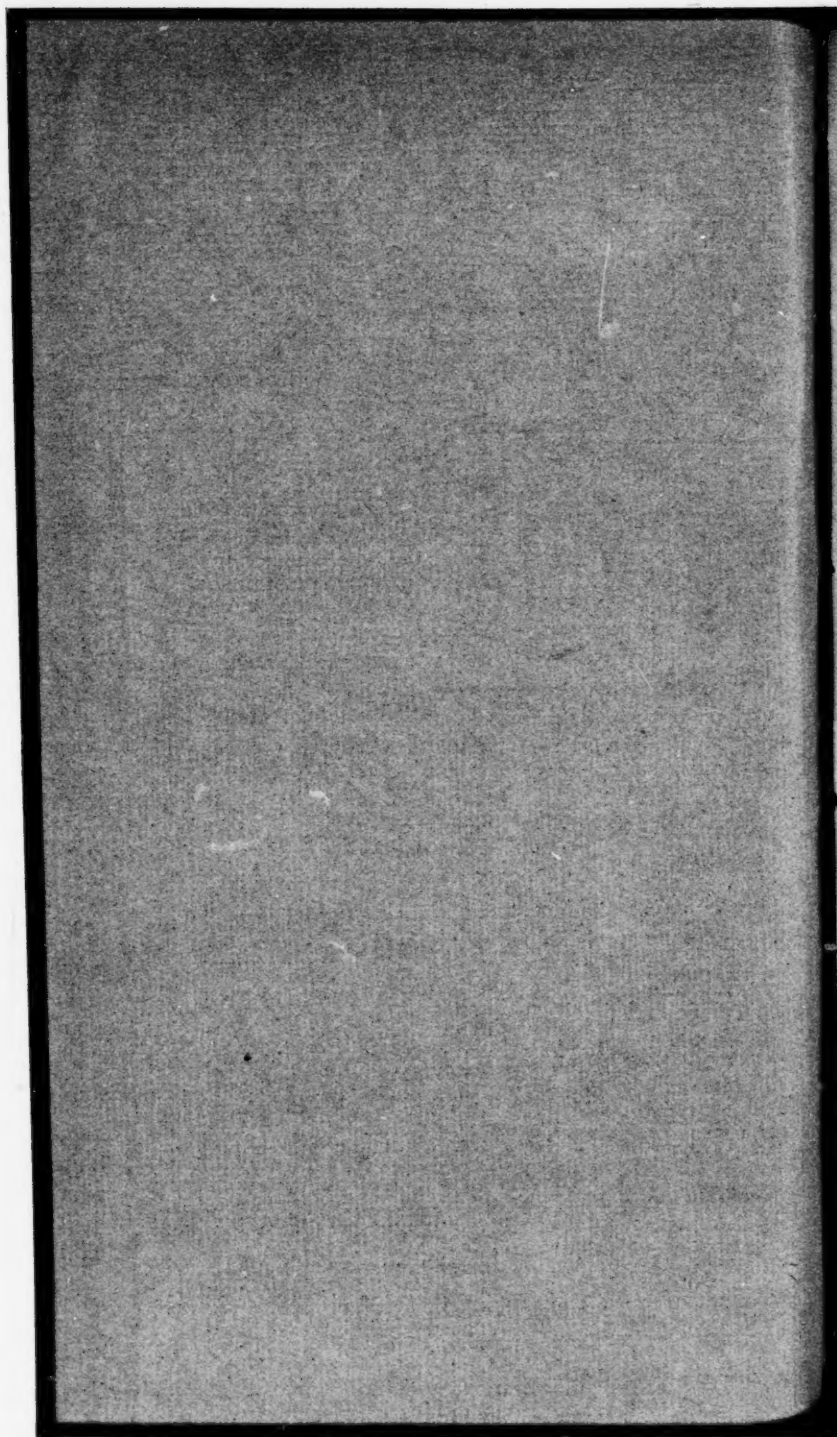
THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, *Appellee*.

No. 151.

Statement and Brief for Appellee.

GARDNER LATHROP,
ROBERT DUNLAP,
THOMAS R. MORROW,
JAMES P. GILMORE,
Solicitors for Appellee.

(2L156)



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THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, *Appellee*.

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Statement and Brief for Appellee.

STATEMENT.

The appeal in this case presents for review the final decree of the court below, finding and holding a statute of the State of Missouri unconstitutional and void, and perpetually enjoining the Secretary of State from enforcing, or attempting to enforce, against the appellee the provisions of the statute, and from revoking, of canceling, or attempting to revoke or cancel its certificate of authority to do business in the State of Missouri as a foreign corporation, and from denying or attempting to deny its right to do business in the State of Missouri because of its removal of cases brought against it in the state courts by citizens of the state to, or bringing suits against such citizens orig-

the statutes of that State imposed no restrictions upon foreign corporations of like kind and nature with the Chicago, Santa Fe and California Railway Company of Illinois, which originally constructed appellee's main line through the State of Missouri.

In 1870, by the Act of Legislature approved March 24th, 1870, the State of Missouri extended the right to foreign railway companies organized and existing under the laws of an adjoining state, to extend, construct, maintain and operate its railway property into and through the State of Missouri, and thereafter, by the Act of the Legislature approved March 26th, 1881, that statute was further amended by striking out the word "adjoining" and inserting in lieu thereof the word "any," so that the privileges of this statute were extended to railway companies organized under the laws of any state (Rec., pp. 6, 7).

Section 1 of the Act of 1870 provided for the consolidation of railroad companies. Section 2 of the Act, however, added a new section to the chapter governing railroads, which is the one under which the appellee and its predecessors entered the State, and as amended by the Act of 1881, hereinbefore referred to, is applicable to the case at bar, (now Section 1060, Revised Statutes of 1889 of Missouri), which is as follows:

"Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may at any time by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the State, for the purpose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary of the state, may extend into the adjoining state, and for that purpose may build, buy, lease or consolidate in the manner provided in the preceding section with any railroads in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and

other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; or any railroad company, duly incorporated and existing under the laws of any state of the United States, may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state: Provided, that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected, until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sub-let, consolidated or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, sixty days' public notice thereof having been previously given, and the holder of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State; And provided further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make arrangements for operating the same, as provided in this Act, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state, shall be subject to taxation and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself; and a corporation of another state being the lessee of a railroad in this state, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued, in all cases and for the

same causes, and in the same manner, as a corporation of this state might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state being the lessee as aforesaid or extending its railroad as aforesaid into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and other notice may be served as upon railroad corporations of this state."

Under the express authority of this law and in pursuance of its guaranties, appellee and its predecessors accepted its invitation, and did so construct, maintain, operate and own its said railway property, and has expended large sums of money, and said property had increased in value until at the time of the institution of this suit it was assessed by the State of Missouri for the purpose of taxation, in a sum over five million dollars (Rec., pp. 7, 8).

In the year 1891, the General Assembly of Missouri passed an act approved April 21st, 1891, requiring foreign corporations, or those created under the laws of states other than the State of Missouri, to qualify under the provisions of said statute by filing copies of their articles of association and paying fees as therein required (Rec., p. 8). This law has been amended by the Legislature since, but the amendments have not so changed the statute in any respect so as to affect the case at bar. The pertinent portions of this Act are as follows:

"Section 1. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this state, or to continue business therein if already established, shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all

*the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. * * **

Sec. 2. Every company incorporated for purposes of gain under the laws of any other state, territory or country, now or hereafter doing business within this state, shall file in the office of the Secretary of State a copy of its charter or articles of incorporation, or in case such company is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal officer or agent in Missouri of the said corporation shall make and forward to the Secretary of State, with the articles or certificate above provided for, a statement, duly sworn to, of the proportion of the capital stock of the said corporation which is represented by its property located and business transacted in the state of Missouri; and such corporation shall be required to pay into the treasury of this state, upon the proportion of its capital stock represented by its property and business in Missouri, incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this state. Upon a compliance with the above provisions by said corporation, the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this state, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Missouri; and such certificate shall be taken by all courts in this state as evidence that the said corporation is entitled to all the rights and benefits of this act, and such corporation shall enjoy those rights and benefits for the time set forth in its original charter or articles of association, unless this shall be for a greater length of time than is contemplated by the laws of this state, in which event the time of duration shall be reckoned from the creation of the corporation to the limit of time set out in the laws of this state; Provided, that nothing in this act shall be taken or construed into releasing foreign loan, building and loan or bond investment companies on the partial payment or installment plan from any provisions of law requiring them to make a deposit of money with a proper office of this state to protect from loss the citizens of this state who may do business with loan,

building and loan or bond investment companies: Provided, that the requirement of this act to pay incorporating tax or fee shall not apply to railroad companies who have heretofore built their lines of railway into or through this state; and, provided, further, that the provisions of this act are not intended to and shall not apply to "drummers" or traveling salesmen soliciting business in this state or foreign corporations which are not entirely non-resident.

Section 3 of the Act provides a penalty for failing to comply with the Act, and the method of enforcing the same, and also contains the following proviso:

Provided that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this state.

Section 956, R. S. 1899, which was in force at all the times involved herein, provided that a domestic corporation should, at or before the filing of its articles of association or incorporation, pay into the state treasury fifty dollars for the first \$50,000.00, or less, of the capital stock of such corporation, and a further sum of five dollars for each additional \$10,000.00 of its capital stock.

Section 1317 also requires a payment of Ten Dollars by each company procuring a license. The company qualifying also has to pay the Secretary of State \$1.50 for issuing the certificate.

In 1907 the General Assembly of Missouri passed the act involved in this suit, which was approved March 13th, 1907, and became effective on June 14th of the same year. This act is as follows:

"Section 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other state, territory or country, and doing business as a carrier of freight or passengers from one point in this state, to another point in this state, under the laws of this state, regulating or authorizing the licensing of, or the issuing of a permit or certificate of authority to, or suffering or allowing any such corpora-

tion to enter or to do business in this state, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, the license, permit, certificate of authority and *all right of such corporation and its agents to carry passengers or freight from one point in this state to another point in this state shall forthwith be revoked by the Secretary of State; and its right to do such business shall cease*, and the Secretary of State shall publish such revocation in some newspaper of large and general circulation in this state, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this state to another point in this state or to do business as a carrier of passengers or freight of any kind from one point in this state to another point in this state at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this state to a point without this state, or from a point without this state to a point within this state, or from making what are known as interstate shipments and transportation.

Section 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point to another in this state, without a license, permit or certificate of authority therefor, first had and obtained from the state of Missouri—to be issued by the Secretary of State or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this state to another point in this state, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the state of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suits to be brought therefor in any court of competent jurisdiction by the attorney general, or the prosecuting attorney of any county in the state, in which the offense shall have been committed; and such offense shall be deemed to have

been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the attorney general or any prosecuting attorney to enforce or carry out the provisions of this act.

Section 3. All acts or parts of acts in conflict herewith are, in so far as they conflict, hereby repealed."

After the passage of the act and the date when it was to become effective, two suits were brought against appellee in the Circuit Court of Macon County, Missouri, the one involving ten thousand dollars and the other twenty-five thousand dollars, the plaintiffs being citizens of the State of Missouri (Rec., pp. 10, 11).

The appellant was threatening to take, and would have taken unless enjoined by the court, the steps provided in the act, to forthwith revoke the license and certificate of authority of the appellee to do business in the State of Missouri, and to enforce the act as provided, if the appellee should remove, or attempt to remove, these cases (Rec., p. 11).

In this state of facts the appellee filed its bill in the court below, and its petitions and bonds for removals in the State court, with the intention of removing them, and afterwards did so remove them (Rec., pp. 11, 22, 23, 24).

The action of the Secretary of the State was threatened on account of the applications for removal and the instituting of the suit in the court below (Rec., pp. 11, 15).

The bill of complaint charged the act with being unconstitutional and void, and contrary to and violative of the Constitution of the United States and of the State of Missouri, upon the numerous grounds therein mentioned, and which will more specifically appear in the brief following (Rec., pp. 12, 13, 14, 16).

Under the unconstitutional act the appellant was threatening to and would have proceeded to attempt to cancel and revoke appellee's authority or right to do business in the state of Mis-

souri, as attempted to be interdicted by the act set forth, and the appellee would have been subjected to a multiplicity of vexatious penalties, suits, actions and proceedings without any adequate remedy at law (Rec., pp. 15, 16).

As heretofore stated, a demurrer was interposed to the original and supplemental bills (Rec., pp. 27, 28).

A temporary injunction was granted (Rec., pp. 28, 29).

The Court below overruled the demurrer and in due and proper course rendered a final decree holding the statute unconstitutional.

The case was brought here by appeal by respondent below, and is now before this Court upon the broad question of the constitutionality of the Act of 1907, under the Constitution of the United States and that of the State of Missouri.

BRIEF AND ARGUMENT.

I.

The act in question is unconstitutional in that it impairs the obligation of a contract between the State of Missouri and the Appellee, which had, prior to its passage, complied with the laws of that state relating to the qualification by foreign corporations to do business therein and which had received license or franchise therefor.

In the year 1870, the State of Missouri passed an act in and by which it granted to foreign railway corporations the right to either construct their lines of railway in and through the State of Missouri, or to acquire such lines therein as had been constructed by other railway companies. This act has been in force ever since that time with some slight modifications, but has not been changed in any respect which affects the issues in the case at bar.

Section 2 of that Act, in force during all the times involved in the issues of this case, provides that any foreign railroad company "may lease or purchase all or any part of a railroad, with all of its *privileges, rights, franchises*, real estate and other property, the whole or a part of which is in this State, and constructed, owned or leased by any other company," the lines of the roads of such companies being continuous or connected at a point either within or without the state, or "may extend, construct, maintain and operate its railroad into and through this State, and for that purpose shall possess and exercise all the *rights, power and privileges* conferred by the general laws of this State upon railroad corporations organized thereunder."

It is at once apparent from these statutory provisions that the foreign railroad company so constructing or acquiring lines of railroad in the State of Missouri, became vested with the privilege and franchise of conducting thereon the business of a common carrier, both state and interstate, and vested with all the rights and privileges of domestic railway companies. It became vested with the right to use such railroad for the

transportation of persons and property,—the only use for which it was adapted. Such right or franchise was an incorporeal hereditament appurtenant to the property—the railroad. This is clear from the very terms of the statute itself, and a foreign railroad company either constructing or purchasing its line of railway in the State of Missouri, becomes vested with the same rights and privileges as a domestic railroad corporation.

The underlying facts show that the main line of the appellee was constructed about the year 1886 or 1887, under the provisions of, and in pursuance of the rights given by the Act of 1870, by an Illinois corporation. What is designated in the bill as a branch line was originally constructed by a Missouri corporation and afterwards sold to another corporation of that State in 1888, which was also authorized under this same statute. The beneficial ownership of all this property was acquired by means of ownership of stock by The Atchison, Topeka and Santa Fe Railroad Company, which may be termed the immediate predecessor of the appellee. The Illinois corporation covered its property, together with all its rights, privileges, grants, franchises, immunities and advantages, with a mortgage securing a large number of bonds. The Atchison, Topeka and Santa Fe Railroad Company became the owner of both the bonds and the capital stock of the Illinois corporation, and thereafter covered its own property, including the stock and bonds of the Illinois corporation, with a mortgage, in the year 1889, which mortgage covered its property wherever situated, and all its rights, privileges, grants, franchises, immunities and advantages. In the year 1895, the mortgage executed by The Atchison, Topeka and Santa Fe Railroad Company was foreclosed, and in the year 1895, by this judicial sale, and by other conveyances and deeds, the appellee became the owner of its lines of railway in Missouri, and has since continuously owned and operated them.

Upon the faith and strength of these laws, investments were made by the companies preceding the appellee and also by it when it purchased a character of property which can only be used in the carrying on of a transportation business and would

be useless for any other purpose. Indeed, under the laws of Missouri, the appellee can hold its property for railroad purposes only, and the peculiar character of the property is such that its use, aside from the law, is necessarily limited to that of a carrier, state and interstate.

In *State ex rel v. Cook*, 171 Mo., 348, the Supreme Court of Missouri briefly reviewed the character of the Act of 1870, and described the invitation extended as "generous," and also declared that the effect of the statute was not only to give a foreign railroad company taking advantage of it, the power to condemn, but also that "all other rights and privileges afforded a domestic railroad corporation were given."

It follows, therefore, from the view of the Supreme Court of Missouri, as well as from the explicit declarations of the statute itself, that the appellee, when it acquired its railroad property in that State, became and is now vested with all the rights and privileges of a domestic railroad corporation.

In 1891, the General Assembly of Missouri passed an Act, approved April 21, 1891, which required foreign corporations to qualify under the provisions thereof by filing copies of their articles of incorporation or association and paying fees, as therein required. The law has been amended in some particulars since, but not so as to change the statute in any respect affecting the case at bar.

Section Two of the Act requires the qualifying foreign corporation to file a copy of its charter or articles of incorporation, or certificate of incorporation, with the Secretary of State and also a certain certificate of its principal officer in the State of Missouri. This section also requires such corporation to pay into the treasury of the State upon the proportion of its capital stock represented by its property and business in Missouri, incorporating taxes and fees equal to those required of domestic corporations. Upon a compliance with these provisions, the Secretary of State is required to give such corporation a certificate to the effect that it has duly complied with the laws of the State and is authorized to do business therein.

It also provides that the corporation shall enjoy all benefits and rights of the act for the time set forth in its original charter or articles of association, unless this should be for a greater length of time than is contemplated by the laws of Missouri, in which event the time of duration shall be reckoned from the creation of the corporation to the limit of time set out in the laws of the State. This section of the Act also provides that its requirements to pay incorporating tax or fees shall not apply to a railroad which had theretofore built its lines of railway into or through the State.

Section 3 of the Act provides a penalty for failing to comply therewith, and also contains a proviso that the provisions of that section shall not apply to railroad companies which had theretofore built their lines of railway into or through the State.

There is no specific limitation in the laws of the State of Missouri as to the time of duration of a charter of a railroad corporation. Section 956, Revised Statutes, 1899, which was in force at all the times involved in the case at bar, provided that a domestic corporation should, at or before the filing of its articles of association of incorporation, pay into the state treasury fifty dollars for the first fifty thousand dollars, or less, of the capital stock of such corporation, and a further sum of five dollars for each additional ten thousand dollars of its capital stock.

Section 1317, which has been applied to all foreign corporations qualifying to do business in this State, requires the payment of ten dollars by each company procuring a license and section 3283 also allows the Secretary of State one dollar and a half for issuing the certificate.

Prior to the enactment of the Act of 1907, now involved, the appellee, as shown by the allegations of the bill, qualified as a foreign corporation under the act of 1891, paying the fees required, and receiving from the Secretary of State a certificate of authority to do business in the State of Missouri. If the case had not turned upon demurrer, and answer had been

had already purchased. By the payment of the bonus it obtained the right to do business in the State as a foreign corporation, subject to only ordinary police regulations, but certainly not to these additional and unreasonable impositions upon the privilege for which it had amply paid, nor to arbitrary or unreasonable regulations or conditions subsequently passed.

In the case of *Western Union Telegraph Company v. The State of Kansas*, decided by this court on January 17, 1910, it seems to us, is found an authority which ought to establish our contention that the act involved in the case at bar is unconstitutional. The situation of the foreign corporation in that case and that the appellee in the case at bar is very similar. The appellee is in a stronger position by reason of the bonus which it has paid. The concurring opinion of Mr. Justice White is especially applicable to the case at bar, and it seems to us, taken in connection with the majority opinion delivered by Mr. Justice Harlan, is conclusive upon the proposition that after a foreign railroad corporation has acquired its line within the State under the authority thereof, the State cannot impose additional burdens or impositions pertaining to the use of such property, and certainly cannot impose any subsequent arbitrary conditions upon the right to use such property in conducting its business.

See also the case of *The Pullman Company v. The State of Kansas*, decided by this court January 31, 1910.

In *Powers v. Railway Co.*, 201 U. S., 543, it appears that the company's charter was granted by the Legislature, and that by the provisions thereof the company was to pay an annual tax of one per cent. on its capital stock paid in, in lieu of all other taxes. It also appears that this provision was made with the view of inducing large expenditures by the corporation and the completion of an unfinished road, and the expenditures were made and the road completed. This Court held that there could be no clearer case of contract than that presented, between the State and the corporation.

In *Railroad Co. v. Pennsylvania*, 153 U. S., 628, a New

York corporation entered Pennsylvania under a statutory grant. In 1846, no work having been done on the road, the Legislature of that State granted it the further right to construct a portion of its road in additional territory, and by the provisions of this act the company assumed the condition of paying annually into the treasury of the State of Pennsylvania the sum of ten thousand dollars, and it was further provided in the act that the stock of the road should be subject to taxation in Pennsylvania to an amount equal to the cost of construction of so much of the road as was in that State. The road was completed, passing through the counties where authorized in Pennsylvania, and the requisite payments were made under the terms of the statute, first, by the original company and thereafter by its successors through foreclosures of mortgages. Afterwards the Legislature of Pennsylvania undertook to require of the company the payment of additional and other taxes upon a different basis than that provided in its statutory grant. This Court, in a lucid opinion by Mr. Justice Harlan, held that there was a contract created between the State and the original corporation and its successors, which was impaired by this legislation, and that the act involved was violative of the Constitution of the United States forbidding the impairment of the obligation of contracts. The Court also asserted with vigor that the State of Pennsylvania could not withdraw its consent, which it gave upon a valuable consideration, to the construction and operation of the road within its limits, and that the right of the railroad company to enjoy the privileges so obtained could not be burdened with conditions not prescribed in the act of the Legislature under which it entered the State.

In *Gordon v. Appeal Tax Court*, 3 How., 133, the State of Maryland, in order to secure the building of a turnpike desired, extended charters to certain banks upon the condition of their subscribing to the necessary stock in the proportions required, and further required that the banks should annually pay to the treasurer of the State twenty cents on every hundred dollars of capital paid in. The Court held that this resulted in giving a bonus for the charters, and that a contract was created

which could not be impaired during the life of the charter grant. The Court also clearly points out that it makes no difference which way the bonus is paid whether in the form of an annual tax or otherwise. The Legislature attempted subsequently to impose taxes inconsistent with this act, and they were held by this court unconstitutional as impairing the obligation of the contract which the State had entered into with the banks involved.

In *Attorney-General v. Bank*, 4 Jones Eq. (N. C.), 287, there is a case showing the opinion of the courts at that early day as to the inviolability of a contract between the State and a corporation where the latter pays a bonus in obtaining its charter. The Court refused to permit any subsequent act of the Legislature to invade or impair the obligation of the contract then created.

In *Wendover v. City*, 15 B. Monroe (Ky.), 258, the Court very clearly states the doctrine that a franchise for which a bonus has been paid may not be taxed by the legislature so as to impair its value.

The case of *Commonwealth v. Mobile & Ohio R. R. Co.* (Ky.), 64 S. W. Rep., 451, is exactly in point. There the Legislature of Kentucky attempted to accomplish the result now sought to be obtained by requiring foreign railway companies to incorporate in the State of Kentucky. The only difference between that case and the case at bar, is that the defendant in the Kentucky case entered that State under a special act of the Legislature, while the appellee came into the State of Missouri under general laws. The corporation was organized under a special act of the State of Alabama. After its incorporation the State of Kentucky permitted it to enter that State under an act granting to it the privileges, rights, immunities and restrictions given to it by the incorporation act of the State of Alabama. A portion of its road in the State of Kentucky was obtained from another corporation, and appeared to have been acquired by provisions of its own and the other company's charters. The act requiring it and other foreign railway companies to incorporate in the State of Kentucky was passed in 1893, about for-

ty-five years after it entered the State of Kentucky. The Court of Appeals of Kentucky held that a contract was created between it and the State by the act permitting it to enter, which could not be violated, and that the attempt to impose this subsequent condition of incorporating under the laws of the State of Kentucky was an impairment of the obligation of that contract. The Court pointedly referred to the advantage of the railroad company had of invoking the jurisdiction of Federal Courts, and held that the result of the act in question would be to deprive it of this right, which, in the opinion of the Court, was a valuable one. The court also emphasized the fact that "the imposition of certain conditions to be performed by the grantee other than the police regulations," before it could "lawfully use or enjoy the privileges theretofore granted it, is essentially a change of the contract."

The fact that in the preceding case and some others to which we have called the court's attention, the corporations were authorized to enter the states and the contracts involved arose under special acts of the Legislature, does not in any way detract from their force as authority. When the provisions of the general laws in force in Missouri relative to foreign corporations, were accepted and acted upon, and particularly that of 1891, a contract with the State was consummated as much as if the corporation had entered under a special act of the Legislature.

In *Bank v. Knoop*, 16 How., 369, this principle is clearly announced where a bank incorporated under a general statute of the State of Ohio. The court held that the act was as special to each bank as if no other institution were incorporated by it.

In the same year and at about the same time that the law of Missouri herein involved, forbidding removals or resorts to Federal Courts was passed, the states of Alabama, Arkansas and Oklahoma passed similar acts; that of Arkansas being almost word for word like the one involved here, and there was no difference in principle as to the others. Foreign railway companies in each of these states sought a relief similar to that ap-

plied for by the appellee, and an injunction was granted in each instance. The United States Circuit Courts in each of these States unhesitatingly held the statutes in question unconstitutional as impairing the obligation of a contract, not only as being discriminatory as between the foreign and domestic corporations, but upon the broad ground that the State could not impair the obligation of such contracts by imposing the arbitrary and unreasonable condition provided. The Circuit Courts also unhesitatingly denied to the State the right to pass any legislation of this character under the police power. Especially in the first Alabama case there is found, it seems to us, an unanswerable statement of the principles to be applied in the case at bar. These cases are as follows:

Seaboard Railway Co. v. Railroad Commission, 155 Fed. Rep., 792;

Railway Co. v. Ludwig, 156 Fed. Rep., 152;

Western Union Telegraph Co. v. Julien, 169 Fed. Rep., 166;

Railroad Co. v. Cross, 171 Fed. Rep., 480.

The Court will readily recognize that domestic corporations are left with the right, under the laws of the United States, to institute certain suits in the Federal Courts arising under the laws of the United States, and the Act in no way attempts to limit or qualify their right to do so. It follows as a consequence, therefore, that the statute of 1907 deprives a foreign corporation of this right, and therefore discriminates against it after its contract rights have become vested, and under the authority of *American Refining & Smelting Co. v. Colorado*, *supra*, must necessarily fall.

The case at bar, however, presents a far broader question than that. Under the authorities which we have cited, the appellee, by paying its bonus, obtained and will have, during the term of its corporate existence, a right to carry on its business as a corporation, in Missouri, subject only to the ordinary police regulations, but not subject to additional impositions for the privileges for which it has paid, nor to arbitrary conditions or regulations subsequently imposed.

We submit that it is beyond the competency of the State of Missouri to pass any act of the character attempted and involved in the case at bar.

II.

The act of 1907 deprives Appellee of its property without due process of law. As the Appellee acquired its railroad in the State of Missouri with the privileges and franchises appurtenant thereto, which included the right to use the same in the transportation of persons and property under the act of 1870, these rights and franchises appurtenant to the property became vested, and the state could not thereafter under the act of 1907 impose an arbitrary or unreasonable condition upon the further exercise of such rights. After the rights and privileges had become vested, the state could only impose such reasonable police regulations concerning the use of the property and the conduct of the business as would be necessary to protect the public in general.

Not only is the act void as an impairment of an obligation of a contract, but it is also unconstitutional as a plain deprivation of appellee's property without due process of law. The property including the appurtenant rights and franchises was rightfully acquired under the act of 1870, which placed the appellee within the State of Missouri with property and property rights, and by the act of 1891 it obtained a personal, if we may so say, right to operate and use this property. Under either act, therefore, rights vested, and an attempt by subsequent legislation to take this property away from it without compensation and based simply upon an arbitrary and unreasonable condition attempted to be subsequently imposed on its further exercise of its right to do business involving the use of its property in the State of Missouri, unquestionably results in depriving it of that property, that is, the beneficial use thereof, without due process of law.

We have shown in the preceding point that the payment of the bonus under the statutes of Missouri unquestionably created a contract, and very briefly we wish to call the court's attention

to the fact that by further qualifying under the act of 1891, the appellee in obtaining its right to do business in the State of Missouri, acquired a franchise in the nature of, if not the same, as an original act of incorporation. With or without the payment of a bonus, we do not think it will be doubted that when the State grants a charter to a corporation, it creates thereby a contract. This is clearly shown in the Darmouth College case to which we have before referred. Corporate franchises are also legal estates vested in a corporation, and are generally classed as incorporeal hereditaments.

In *Society for Savings v. Coyte*, 6 Wall., 594, this court clearly stated the proposition that "corporate franchises are legal estates vested in the corporation itself as soon as it is *in esse*." The court also held that these franchises are not mere naked powers granted to corporations, but powers coupled with an interest.

To the same effect see:

Hamilton County v. Massachusetts, 6 Wall., 632.

California v. Railroad Co., 127 U. S., 1.

It follows, therefore, it seems to us, as an inevitable consequence that when the appellee bought its property under the act of 1870, and the State qualified it to do business as a foreign corporation under the Act of 1891, whether or not a bonus was exacted or paid, it obtained by reason of both or either of the statutes franchise rights vesting in it a legal estate, and under the former act of 1870 obtained actual tangible property with the rights and franchises appurtenant in respect to the use of the same as a common carrier thereon.

In *State ex rel. v. Ackerman*, 51 Ohio St., 163, the character of a certificate of authority to do business in the State by a foreign corporation is well illustrated where the court held that "the authority emanates from the State and the privilege granted is a franchise."

In *Life Insurance Co. v. County*, 28 Montana, 484, there is a like declaration of this principle by the Court.

In *State ex rel. v. Railroad*, 43 Minn., 17, there was in-

volved the question of a foreign railroad company operating and doing business in the State of Minnesota under statutes somewhat similar to those of Missouri. The court there clearly indicates that the authority given to the foreign railroad company under its statutes was a franchise, and that its corporate powers, franchises and privileges which were the essential and valuable rights of the corporation in that State were as entirely and exclusively the creation of the laws of that state as if it were a corporation primarily brought into being by the laws of that State, and in that sense the railroad company was "created under the laws of Minnesota."

In *Wilmington Railroad v. Reid*, 13 Wall., 264, there was involved the charter of a railroad company which contained a stipulation of exemption from the payment of taxes. This Court emphasized the contractual character of a charter and clearly included franchise rights as a part and parcel of its property, and the privilege of operating its railroad as an element of the value of its property. This doctrine was afterwards re-stated and re-affirmed in the more recent case of *Railroad Company v. Hewes*, 183 U. S., 66.

In the Reid case, *supra*, under consideration, the court after most positively stating the contractual character of a charter, further showed that it is that which gives value largely to railroad properties and considered "*nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property and of the most valuable kind, as it cannot be taken for public use even without compensation.*"

The Court further adverted to the fact that while the franchise was not the same sort of property as the rolling stock, roadbed and depot grounds, yet it was equally with them covered by the general term "the property of the company," and "therefore, equally within the protection of the charter."

See also:

Railway Co. v. Sullivan, 173 Fed. Rep., 556.

The State of Missouri has an equally strong due process

clause in its constitution, as is shown by Section 30, Article II thereof.

The fact, therefore, that appellee had property lawfully acquired in the State of Missouri, brings it under the protection of both the Federal and State Constitutions as to being deprived of its property without due process of law. The statute under consideration is, therefore, certainly unconstitutional, in that it deprives appellee of its property without due process of law, for the following, among other reasons: (a) It seeks to forfeit appellee's property and vested rights by imposing subsequent to the vesting thereof, arbitrary or unreasonable conditions to their further use; (b) The forfeiture is based upon the arbitrary will and exercise of authority by the Secretary of State, making his action conclusive; (c) The forfeiture thereof is accomplished under the Act without any notice or hearing in any judicial tribunal; (d) It attempts to forfeit appellee's right to carry mails between intra-state points in Missouri as a post road established by Federal authority; (e) It closes the courts of the United States to appellee over subject matters of which such courts have exclusive jurisdiction; (f) It imposes unreasonable and excessive penalties as a risk for resorting to the courts to have appellee's rights determined.

It becomes apparent, it seems to us, that the unreasonable and arbitrary conditions imposed in this legislation make it a clear case of depriving appellee of its property without due process of law under the Constitution of the United States and also that of the State of Missouri. A brief statement and review of the position of appellee as the purchaser of its railroad property under the Act of 1870 alone will show that it deprives appellee of its property without due process of law.

The allegations of the bill of complaint are such, and the proof would have shown if answer had been made, that under the authority of the laws of Missouri, particularly the law of 1870, The Atchison, Topeka & Santa Fe Railroad Company whose line of railroad extended to the state line of Missouri, through the agency of the Chicago, Santa Fe and California Railway Company, constructed and extended such line through

the State of Missouri. The latter company, on such construction, was vested by the statutes with the franchise right and privilege of operating the railroad as a common carrier and transporting thereon passengers and freight, both state and interstate, at reasonable rates and doing generally the business of a common carrier thereon. Subsequently, The Atchison, Topeka and Santa Fe Railway Company, under the foreclosure proceedings foreclosing the mortgage of The Atchison, Topeka and Santa Fe Railroad Company, acquired all the property and rights of the latter company and became the equitable owner of the line of railroad through the State of Missouri by virtue of acquiring all of the capital stock of the Chicago, Santa Fe and California Railway Company which had theretofore been owned and pledged by the Atchison, Topeka and Santa Fe Railroad Company under its mortgage. Subsequently, and in pursuance of the authority of the laws of 1870, which were still in force, The Atchison, Topeka and Santa Fe Railway Company took a deed from the Chicago, Santa Fe & California Railway Company, and thereby became vested with legal title and with all the privileges, rights, franchises and property so deeded which had belonged to the Chicago, Santa Fe & California Railway Company. These privileges and rights included, of course, the right to transport passengers and property upon the railroad in the State. These franchises, rights and privileges attached to the property as an incorporeal hereditament or appurtenant thereto and constituted the main value of the property, that is, the railroad. Without such rights of user the railroad would be practically valueless. No condition showing the tenure upon which such right should be held was prescribed by the statute of Missouri then in force except, possibly, the condition that in case a foreign railroad should extend its line in or through the state, it should possess and exercise all the rights, powers and privileges conferred by the general laws of Missouri upon railroad corporations organized thereunder and "shall be subject to all the duties, liabilities and provisions of the law of this state concerning railroad corporations as fully as if incorporated in this State." That would simply, however, subject such foreign

corporations to the same duties, liabilities and provisions as should be imposed upon domestic corporations by the general laws of Missouri with reference to the operation of the railroad and the general transaction or conduct of its business as a common carrier with the public. The right to remove cases to the Federal Courts, however, is not one which the laws of Missouri *deny* to domestic corporations, and is in any event a right to be exercised by foreign corporations merely under the laws of the United States. It is not the exercise of a corporate power or a privilege, because the Federal laws do not grant such right as a corporate power or privilege, but as a privilege to be exercised by non-resident citizens of other states of the United States.

Now, it seems to us plain that these rights and privileges which attach to the use of the property, when they become vested under the law of the state, are property rights which cannot be taken away without compensation by the state (*Gulf & S. I. R. R. Co. v. Hewes*, 183 U. S., 77; *Monongahela etc. Co. v. United States*, 148 U. S., 312), and are rights which inhere in the value of the property, so that they must be considered, even under the exercise of the rate making power of the State.

Wilcox v. Cons. Gas Co., 212 U. S., 22, 44;

Brunswick & T. Water Dist. Co. v. Maine Water Co.,
59 Atlantic, 537.

Therefore, these rights cannot be forfeited by the State *afterwards* attempting to impose an arbitrary or unreasonable condition to their further exercise any more than a State might, after title to property has vested, subsequently create and attach an arbitrary condition to the right to further hold or enjoy such property. It might be conceded that such rights might be forfeited by the State on the failure of the company to observe some condition upon which the rights were granted and held; but even in that event, the forfeiture could only be made effective by judicial proceedings.

Garfield v. Goldsby, 211 U. S., 249, 262.

Now, it seems evident that if the State attempts to forfeit

a vested right by mere administrative act or non-judicial proceeding, or if it attempts to forfeit a vested right upon the ground that the railway company has failed to comply with an arbitrary and unreasonable condition imposed after the vesting of the right, that then the State is depriving or attempting to deprive the railway company of its property and rights without due process of law, and its action is in violation of the Fourteenth Amendment.

Now, the condition imposed by the law of 1907, is that if a foreign railway company which had prior thereto lawfully acquired its right of way and railroad and right to use the same in the transportation of passengers and freight, shall exercise a right granted to it by the laws of the United States by removing a cause to the Federal Courts, it shall be deprived of the right "to do business as a carrier of passengers and freight of any kind from one point in this state to another point in this state at any time within five years within the date of such revocation or the cessation of such right." When the State deprives the railway company of this use of its property—the only use of which the property is capable—it takes the property of the railway company without compensation, and in as far as it takes it for an alleged failure to comply with an arbitrary condition subsequently imposed, and which had not been imposed at the time the right vested, it deprives the railway company of its property without due process of law. The Statute of 1907 denies in terms to the railway company the right to use its property in the manner and for a purpose which had been lawfully granted to it prior thereto by the state.

It is true, also, that there is, in the purchase of the railroad, a vesting of contract rights with the State, as there is in every other case of a grant from the State within the reasoning of the Dartmouth College Case. It may be a contract executed so far as the State is concerned, when the grant is made or attaches, but elements of contract still adhere.

It is obvious, therefore, for the above reasons, that this case is easily distinguishable from all the cases cited by the appellant in which this Court upheld the State statutes which

Railway Co. v. Simmonson, 64 Kans., 802;

Railway Co. v. Payne, 33 Ark., 816;

Mayer v. Verlandi, 39 Minn., 438.

The Court will also observe that if the appellee should exercise its constitutional right to resort to the Federal Courts, the enforcement of the law would result in depriving it of its right to carry mails from one point in the State to another point therein, which, of course, is now extensively done.

Section 3964 U. S. Revised Statutes, 1899, makes all railroads or parts of railroads in operation post roads. This illustrates not only the extent of the deprivation which the statute would inflict, but also brings it directly in conflict with the business of the National Government itself.

Incidentally, we call the Court's attention to the fact that there are certain subject-matters of which the Constitution and laws of the United States have given the Federal Courts exclusive jurisdiction. Section 711 Revised Statutes, vests exclusive jurisdiction in the Federal Courts as to all cases arising under the patent-right or copyright laws of the United States and as to all matters and proceedings in bankruptcy. If the act in question, however, be held valid and enforced, it will be impossible for the appellee to institute a suit in the Federal courts against a citizen of Missouri concerning any patent rights which might at any time become necessary, nor could it become a petitioner in involuntary bankruptcy against a citizen of the State of Missouri, however vast the interests it might conserve thereby.

It is not beyond the bounds of probability that the courts of Missouri might construe the act so as to deny the appellee the right to sue out a writ of error from this Court to the State courts of last resort. Even in the case of the removal of a suit from a State to a Federal court, there is in a sense the institution of that suit in the Federal Court, as the petition and bond for removal are in the nature of process, bringing the suit in the Federal Court (*Ex parte Wisner*, 203 U. S., 449; *Kinney v. Savings & Loan Association*, 191 U. S., 78). It is,

however, generally recognized that a writ of error is a new action, and where this view obtains, a writ of error from this Court to a State court would be instituting a proceeding therein. That is the doctrine of the Supreme Court of Missouri, and, of course, in enforcing the statute, following its own decisions, a forfeiture would follow if the appellee should find it necessary to sue out a writ of error from the highest court of our land to one of our State courts (*St. Louis v. Butler*, 201 Mo., 399, and cases there cited.)

The penalties provided by this Act are so severe that it needs but a slight calculation to show that, if they be enforced, it would result in a few days in running up penalties exceeding the value of appellee's property in the State of Missouri, in addition to depriving it of doing all state business therein for a period of five years.

It is perhaps a work of supererogation to call the Court's attention to its recent decision of *Ex parte Young*, 209 U. S., 123, and cases therein cited, which we think conclusively establishes the unconstitutionality of this law on account of the penalties imposed.

In this connection we desire to briefly call the Court's attention to the fact that under the due process clause of the Constitution of Missouri, there is unquestionably a deprivation of appellee's property without due process of law. The Supreme Court of the State of Missouri has, if anything, more strictly construed its own clause than has this Court that of the Federal Constitution.

In *St. Louis v. Hill*, 116 Mo., 527, the Act of the Legislature of Missouri providing that a city with a population of a certain number of inhabitants and more, might establish a building line on a boulevard to which all structures thereon should conform, but making no provisions for proceedings to condemn the land and for notice to the owners, was held in contravention of the due process clause of the Constitution of the State of Missouri. The Supreme Court in its opinion there has declared the law which has been followed in many

cases since and stands as the impregnable doctrine of that Court. The Court emphasized in this case the fact that it was not necessary to take the tangible and visible property, but that if its use was taken or impaired or prevented, to the extent that such occurred, it was taking without due process of law. The Court also emphasized that the right to use property was one of its most essential constituent elements and "that anything which destroys or subverts any of the essential elements," including the use, was a taking or destruction of property though the possession and power of disposal remained undisturbed, and though there was no actual or physical invasion of the property. Indeed, the Court emphasized that "the use of a given object is the most essential and beneficial quality or attribute of the property," and "without it all other elements which would go to make up property would be of no effect."

See also:

State v. Ju'ow, 129 Mo., 163;

In re Flukes, 157 Mo., 125;

State ex rel. v. Ashbrook, 154 Mo., 375;

State v. Loomis, 115 Mo., 307;

State v. Tie & Timber Co., 181 Mo., 536.

As this suit is brought as one upon diversity of citizenship as well as that of one arising under the Constitution and laws of the United States, this Court is at liberty, even under the Constitution of the State of Missouri, to declare the law invalid, although it might feel constrained that it could not go so far under the Federal Constitution. We submit, however, that it should be declared unconstitutional as a deprivation of its property without due process of law under the Constitutions of both the United States and the State of Missouri.

III.

The penalty provisions of the statute in question are so excessive and unreasonable that they violate the Fourteenth Amendment to the Constitution of the United States and result in depriving Appellee of its property without due process of law.

The penalties imposed by the Act in question are so severe that it amounts to a deprivation of property without due process of law. It penalizes appellee with a fine of not less than \$2,000, nor more than \$10,000, for every passenger or shipment of freight carried entirely within the State of Missouri, and denies it the right to carry on its State business for a period of five years after the revocation of its license, following the mere exercise of its constitutional right to resort to the Federal courts. It is a matter of easy calculation to show that it would take but a few days' liability to the penalties to more than consume the value of appellee's property in Missouri, and it would take no great length of time to accumulate penalties equal to the value of its entire property, within and without the State of Missouri, or, indeed, that of any other railroad company in the world.

The recent case of *Ex Parte Young*, 209 U. S., 123, and cases there cited, is conclusive upon this proposition.

IV.

The Prewitt and other cases considered and distinguished.

The case which is most relied upon to sustain the legislation in question is that commonly spoken of as the Prewitt Case—*Life Insurance Company v. Prewitt*, 202 U. S., 246. An examination of that case discloses that the State of Kentucky had a statute relating to foreign insurance companies which required them to take out annually a license to do business in the state. The license was granted each year simply for one year. (Sec. 635 of the Kentucky statutes.) The Kentucky statute also contained a

provision to the following effect: That before authority would be granted to any foreign insurance company to do business in the state, it must file with the commissioners a resolution adopted by its board of directors, consenting that service of process upon an agent of the company in the state or the commissioner of insurance, in any action brought or pending in the state, should be a valid service upon the company, and then proceed to provide that:

"If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, removed said suit or proceeding against any citizen of this state into any federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agent to do business in this state."

The facts disclose that when the insurance company in question entered the State of Kentucky to do business, these statutes were in force, and therefore the company, in entering the State to do business, and not being already there, and not having any property or investment there, was bound to submit as a condition to its entering, to such conditions as the state might impose in relation to foreign corporations. It will be observed that case presents a totally different situation than that presented by the foreign railway companies of the State of Missouri under the legislation now involved, because such foreign railway companies are already in the State—have their property and their investments here, and the property of the appellee had been here during many years before this act was passed.

In the Prewitt case there is not a syllable in the record to show that the foreign insurance company had one dollar's worth of property in the state of Kentucky. So far as the record advises us, it had nothing there except contracts of insurance, which, when running, were in all probability taken to the State of its domicile. It does not appear that it even had an office in the state of Kentucky and probably only had agents who had their own offices.

The court, in passing upon the Prewitt case, used the following significant language:

"A state has the right to prohibit a foreign corporation from doing business within its borders, *unless such prohibition is so conditioned as to violate some provision of the Federal Constitution.*"

Our contention is that the act is invalid, and, as we have already said, is repugnant to the Federal Constitution and to the federal laws passed in pursuance thereof. When the Prewitt case was decided, Mr. Justice Day, with whom concurred Mr. Justice Harlan, dissented in a very strong opinion. They said, among other things:

"The Kentucky statute imposes but a single condition necessary to be known and considered upon the right of foreign corporations to do business within that state. It said in effect to a company not yet licensed to transact business within its borders, there is no objection to the company transacting business in the state; on the other hand, it is desirable that it shall do so, subject to the condition that the company may cease to do business in the state and its license be revoked, the moment it attempts to avail itself of the constitutional right to remove a controversy in a Federal court under the terms of the Federal statutes passed to make the constitutional right effectual.

They further say:

As a general proposition, it is undoubtedly true that a state may prevent foreign corporations, *at least those not engaged in interstate commerce*, from doing business within its borders, and may impose restrictions upon the rights to transact local business as it may see fit, *but this right, in our opinion, is not without limitation.* It is the established doctrine of this court that the restriction of this power is found in the denial of the right to a state to impose a condition in the direct conflict with the Constitution of the United States in requiring a corporation, as a sole condition of doing business within the state, to surrender the right of removal created and enforced by the Federal Constitution and laws in advance, already given it, *after its admission to do business in the state.*

They quote also from the decision in the case of *Insurance Co. v. Morse*, 20 Wall., 445, the following language, "In all cases in which this court has considered the subject of granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States." They quote also from several other cases, among them as follows:

70 Fed. Rep., 113, *Bigelow v. Nickerson*, where it is said:

"We consider the question foreclosed and no longer open for discussion. No condition imposed upon a right granted by a state which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States can be upheld."

From 70 Fed. Rep., 573, *Reimers v. Seatco Mfg. Co.*, where it is said:

"The right of a state to impose conditions upon foreign corporations doing business therein is not unlimited."

And from the case of *Insurance Co. v. French*, in the 18th Howard, in which it is said:

"This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions can be deemed valid and effectual by other states and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others."

After further proceeding, the Court says:

"If each state could enact a statute such as the one before us, the right secured to a corporation when sued in the courts of the state other than the one creating it, to invoke the jurisdiction of the Federal court, would be abrogated through the whole United States, although such right is secured by the Constitution and by valid acts of Congress. We cannot assent to that view. *It amounts to a practical nullification in respect to such corporations of the supreme law of the land and places important constitutional rights at the mercy of the several states.*"

The *Drewitt* case, as above stated, is clearly distinguishable from the situation presented by the foreign railways of this state, and to deny them the right to operate their properties in Missouri, if they should exercise their constitutional right of removal of a cause to the Federal court, or other constitutional right to sue a citizen of this State in the Federal court, is practically a confiscation of the property. In this connection the words of the Supreme Court of Missouri, in the case of *State ex rel. Railroad Co. v. Cook, Secretary*, 171 Mo., 348, are very significant and very cogent. The facts upon which this case was presented were briefly these: The railroad in question was incorporated in Kansas in the year 1884, to construct and operate a railroad from a point in Kansas through several counties therein and Missouri, to Kansas City, and thence to St. Louis. It built a portion of its line in Missouri prior to the enactment of the foreign incorporation law of this state of 1891, and after the enactment of that law, proposed to build a further portion of its line and claimed the right to be exempt from corporation fees, both as to the line to be built and the line already built, or rather in regard to the capital thereby represented in the State of Missouri.

The Supreme Court exempted it from the tax in regard to the line already built, and said, among other things:

"Railroad corporations are a class in themselves, having peculiar rights and corresponding liabilities, and they are even treated as a class by the law-making power."

The Court then proceeded to explain upon these lines why the exemption hereinbefore referred to was placed in the foreign law of 1891 in regard to foreign railway companies, whose lines were already built, and then employed the following very significant language:

"But as before observed, the property and business of a railroad company differ from those of all other corporations, and we must consider that peculiarity in this instance. If a corporation of any other character is found doing business here after the act of 1891 took effect without having complied with its terms, it would be subject to

the penalties imposed by the act, because it was intended by the law-makers that such corporations, if they did not care to submit to our terms, were free to cease their operations here and return to their homes. *But that intention could not apply to a railroad company then owning and operating fifty or sixty miles of railroad in this state. To forbid such a company to continue to transact its business within the state would be to destroy its property. That our legislature never intended to do."*

Can there be any doubt but that a refusal to permit the appellee to do business within the State of Missouri, except when it had violated some part of its franchise, would be to destroy its property, without due process of law? That is certainly the view taken by the Supreme Court of Missouri. The appellee came into the State when the welcome was wide and hospitable, and its property was acquired at a great expense. It seems to us that the Act in question not only violates a contract, as heretofore shown, but that it is as well as denial of the equal protection of the laws, and a deprivation of property, if enforced, without due process of law.

Upon the hearing below, and it is now contended, that in the Prewitt case the question of property investment in the state of Kentucky was involved, and that property had been acquired in that state upon the faith of the license as in the case at bar. The reference, however, to the case is decided by the Court of Appeals of Kentucky, in 83 S. W., 611, which cannot but be sustained. The statement of the Court contained in the opinion, so far as it discloses the investment of any money by the Insurance Company, is as follows: "It employed a large number of agents, established a large number of agencies throughout the state, expended large sums of money in advertising its business, and acquired a large and profitable business in the state."

It does not, therefore, appear that there was a single dollar's worth of property belonging to the Insurance Company in the state of Kentucky.

In this connection we refer to the dissenting opinion by

Judge Barker in the same case, reported in 84 S. W. Rep. 527, and especially do we refer to the following language in that decision:

"The opinion of the majority, as said heretofore, is not only contrary to authority, but also to reason. The policy of the national law under discussion is to place, as far as possible, a citizen of one state engaged in litigation with a citizen of another state on a plane of equality before the law; in other words, to make it possible that the stranger may defend his property or rights *free from the bias of local prejudice or passion*. No disinterested mind will deny that this is a just policy. *The question then, is whether this beneficent policy in the interest of a fair and impartial trial to the foreign citizen may be nullified by a statute enacted for the selfish purpose of giving the citizen the advantage of a trial close to his home (to put the most favorable construction on it) without any regard to the still greater distance of the stranger from his home, and his inconvenience on that score, or of the danger of his suffering from local prejudice or passion in a suit with the citizen. The state statute considers only the convenience of the citizens as measured by the additional distance to the place of trial after removal of the case to the Federal court, and ignores the danger to the foreigner of a miscarriage of justice on the merits of the controversy, arising from local prejudice or passion in the state tribunal. The existence of such a statute, in itself, affords a justification of the national policy, as expressed in the removal statutes, if such justification were needed. It may not be altogether impertinent to the subject in hand to say, in conclusion, that it would be well to remember that it is a narrow and provincial view to regard these national laws as harsh and severe edicts imposed by a foreign sovereign, instead of benignant laws imposed by ourselves in the interest of a broad and national justice, and that, in their practical operation, many more of our own citizens are benefited by them in their litigation in other states than are inconvenienced by them in favor of citizens of foreign states litigating in our commonwealth."*

We shall not undertake to consider all the cases cited by the appellant in his brief *seriatim*, as the distinguishment of those cases wherever necessary is clearly shown by the authori-

ties which we have cited. Upon analysis of the cases it will be seen there is nothing in them which in any way countervails our contentions.

We shall notice two cases involving revocation of permits or licenses of foreign corporations, which will show how easily all are distinguished.

The case of *Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28, is clearly distinguishable from the case at bar. That was a case involving the anti-trust act of the State of Texas, and one clearly sustainable under the police power of the state. That was not the case of a corporation which had qualified to do business under the circumstances in the case at bar, but it was where the imposition of conditions was upon a corporation seeking to do business, and not an attempt to impose conditions upon one which had already entered the State under its laws. It was after the act by which this forfeiture went into effect that the State granted authority to the foreign corporation involved to do business, and the conditions were a part of the permit and were accepted by the company.

The case of *Hammond Packing Company v. Arkansas*, 212 U. S., 322, in one which re-affirms *American Refining & Smelting Company v. Colorado*, *supra*, and confirms our contention as to the contract involved in the case at bar. This Court, among other things, based its decision upon the fact, as it clearly stated, that the prohibitions of the statute were made "applicable to domestic and foreign corporations," and not confined to the latter class. This Court also referred to the police power of the State, and also to the reserve power under the Constitution of the State of Arkansas to repeal, alter and amend charters by it granted, which power cannot be invoked in the case at bar.

V.

The statute being invalid, Appellee clearly brings itself within the right of the injunction granted.

Counsel with seriousness seem to insist that because the duty is not imposed upon the appellant to bring suits after revoking the license or authority to do business, the appellee

must wait until this has been accomplished before it can obtain any relief. It must, therefore, have this valuable right destroyed, or at least canceled and be subjected to severe penalties and consequences before it can apply to a court of equity for relief in any way. In other words, we are urged to let the horse be stolen and then lock the barn. The very object of equity is to prevent such consequences and in the incipency to check the wrong and not permit it to scar with a single injury.

We have shown that this authority to do business is a property right in itself, and that to destroy it would be to result in taking away the property rights of the appellee.

The bill shows that the appellee's line of railway runs through as many as twelve counties in the state of Missouri. The moment the Secretary of State should act under the statute, and undertake to revoke the authority of appellee to do business in this state, then immediately, if the appellee attempted to do any intra-state business, it would be subject to suits in every one of those counties for every passenger it attempted to carry and for every piece of freight it endeavored to transport of the character coming within the Act. A multiplicity of suits would certainly follow with twelve prosecuting attorneys, and the Attorney-General thrown in as good measure, bringing all these suits. The object of this suit, among other things which may be suggested, is to prevent just such a state of affairs, and unless the decisions of this Court are to be overturned and held for naught, there is no doubt of the appellee being entitled to the relief sought if the act is invalid.

Doyle v. Insurance Co., 94 U. S., 535, cited and relied upon by appellant himself, is certainly a case sustaining this proposition, as that was the procedure followed then, and it seems never to have occurred to parties, counsel or courts, that it was not a proper method, and this Court ultimately decided the case without raising any question as to its being the proper method.

We shall not discuss in detail the cases, but among the many call the Court's attention to the following:

Ex parte Young, 209 U. S., 123;

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216 U.S., 146.

govern the destinies of a liberty-loving and law-respecting people, and to safe-guard their rights of person and property within both the spheres of the states and of the United States, had in mind that *there must be Federal courts and that such were essential to the peace, welfare and harmony of the people.*

It will be observed by reference to said excerpts that at the conclusion of the *opening* address of the convention by Mr. Edmund Randolph, of Virginia, and when he was proposing the remedy for then existing conditions under the Articles of Confederation, his plan provided for a "*national judiciary*" to consist of one or more supreme tribunals and of *inferior tribunals*, and also that the jurisdiction of the national judiciary should embrace cases in which *citizens of other states*, applying to such jurisdiction, *might be interested.*

The first formal draft of a constitution submitted to the convention by Mr. Charles Pinckney, provided for the establishment by the legislature of the United States of "*such courts of law, equity and admiralty, as shall be necessary,*" and that one of them should be termed the Supreme Court, whose jurisdiction should extend—among other things—"*to all cases arising under the laws of the United States.*"

It will be further observed that the consideration of the question of the national judiciary extended through all the proceedings of the convention, was regarded as a matter of vital importance and was given the most careful, thoughtful and serious consideration, and always with the *conceded necessity* for the establishment of a Federal forum in which could be heard and tried, among other things, *controversies between citizens of different states.*

When Mr. Randolph's propositions were reached, he, himself moved their postponement, in order that there might be first considered three other propositions, one of which was of a nature underlying all others, and that was "That a national government ought to be established, consisting of a *supreme* legislative, executive and *judiciary.*"

Thereafter, on July 26th, when the proceedings of the Con-

vention of the previous week were referred to the Committee of Detail, and an adjournment was taken until August 6th, in order that the Committee might have time to *prepare and report the Constitution*, there were contained in the proceedings so referred, resolutions to the effect that "The government of the United States ought to consist of a supreme legislative, judiciary and executive" and that "*a national judiciary be established to consist of one supreme tribunal,*" and that "*The national legislature be empowered to appoint inferior tribunals,*" and that "*The jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature and to such other questions as involve the national peace and harmony.*"

When the Committee of Detail reported on August 6th, the first draft of the Constitution, it contained the following articles:

II.

The government shall consist of *supreme legislative, executive and judicial power*

XI.

Sec. 1. The judicial power of the United States shall be vested in one Supreme Court, *and in such inferior courts, as shall, when necessary, from time to time, be constituted by the Legislature of the United States.*

In Section 3 of said Article XI, it was also provided that the jurisdiction of the Supreme Court should extend, among other things, to controversies "*between citizens of different states.*" Said section also provided for a division of such jurisdiction into two parts, viz.: original and appellate, and specified what matters should fall under each. It then further provides that, aside from the instances of original jurisdiction, its jurisdiction should be appellate "*with such exceptions, and under such regulations as the legislature shall make*"; and further provided that the legislature *might assign* any part of the jurisdiction specified (except the trial of the President of the United States) "*in the manner and under the limitations which it shall think proper, to such inferior courts, as it shall constitute from time to time.*" When Mr. Randolph's proposition for the establish-

ment of a national judiciary was before the convention, it passed *without a dissenting vote*, and to this resolution was added the words: "to consist of one supreme tribunal, *and of one or more inferior tribunals.*"

When the Committee on Style reported on September 12th, a digest of the plan of the Constitution, it contained the following provisions:

ARTICLE III.

Section 1. The judicial power of the United States, both in law and equity, shall be vested in one supreme court, *and in such inferior courts* as the Congress may from time to time ordain and establish.

Section 2. The judicial power of the United States shall extend to all cases, both in law and equity, arising under this Constitution, the laws of the United States, "* * *" to controversies between two or more states; between a state and citizens of another state; between citizens of different states."

The Constitution, as signed by the members of the Convention, contained the following provisions:

ARTICLE III.

Section 1. The judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish.

Section 2. The judicial power shall extend to all cases, in law and in equity, arising under this Constitution, the laws of the United States, "* * *" to controversies between two or more states; between a state and citizens of another state; between citizens of different states, etc.

A critical examination of the proceedings of the Convention discloses that the two central ideas contended for and combatted respectfully were, first: That there should be Federal tribunals *inferior to the Supreme Court*, and second; that the State courts ought to be permitted to decide in the first instance, and that the right of appeal to the Supreme Court was sufficient to secure the national rights and uniformity of judgments, and that the establishment of such inferior tribunals was an unnecessary encroachment upon the jurisdiction of the states.

The fullest discussion was had of both of these views, and the Constitution was adopted and as it remains at the present time, was the ultimate outcome of an exhaustive consideration of both theories.

The proceedings show how tenaciously some members clung to the second theory in this, that after the Committee of the Whole had passed the resolution providing that:

"A national judiciary be established, to consist of one supreme tribunal, and of one or more inferior tribunals,"

Mr. Rutledge obtained a rule for reconsideration of the clause establishing inferior tribunals under the national authority, and moved that that part of the Ninth Resolution be expunged. Much discussion was had upon this motion, and the matter at this time was put in the following shape, viz.:

"That the national legislature be empowered to institute inferior tribunals."

From this was finally evolved the language in regard to inferior tribunals as it now appears in the Constitution, viz.:

"And in such inferior courts as the Congress may, from time to time, ordain and establish."

The discussion is instructive, and the reasons which prevailed were those presented by Mr. Madison, who observed:

"That unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree; that, besides an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudice of an undirected jury? To remand the case for a new trial would answer no purpose. To order a new trial at the Supreme bar, would oblige the parties to bring up their witnesses, though ever so distant from the seat of the court. An effective judiciary establishment commensurate to the legislative authority was essential. A government without a proper executive and judiciary, would be the mere trunk of a body, without arms or legs to act or move.

In Appendices A and B attached hereto will be found the

excerpts referred to and copied from Madison's Journal of the Convention, and the quotations from the "Federalist" respectively.

In view of the authorities which we have adduced and the rules enunciated, and the historical review of the jurisdiction of the Federal courts, is there, or can there be any question but that the action of the trial court below was amply justified, and that the opinion of the learned Judge given in the case states the law which should be applied in this instance.

We submit that the opinion of the Court below fully and correctly states the law of the case at bar, it should be sustained in every particular, and that the decree of the Court in making the injunction final should be affirmed.

Respectfully submitted,

GARDINER LATHROP,

ROBERT DUNLAP,

THOMAS R. MORROW,

JAMES P. GILMORE,

Solicitors for Appellee.

APPENDIX I.

CONSTITUTIONAL PROVISIONS OF THE STATE OF MISSOURI.

ARTICLE II.

Sec. 10. *Courts must be open.*—Courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay.

Sec. 15. *Ex post facto laws, etc., prohibited.*—That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making an irrevocable grant of special privileges or immunities, can be passed by the General Assembly.

Sec. 30. *Due process of law,—person.* That no person shall be deprived of life, liberty or property without due process of law.

ARTICLE IV.

Sec. 53. *Special and local prohibited.* The General Assembly shall not pass any local or special law. * * *

Granting to any corporation, association or individual, any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track. * * *

In all of the cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question which shall be judicially determined without regard to any legislative assertion on that subject.

STATUTORY PROVISIONS.

ACT OF MARCH 24, 1870.

An Act to amend Chapter sixty-three of the General Statutes, entitled "of railroad companies," so as to authorize the consolidation, leasing and extension of railroads.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Any two or more railroad companies in this State, existing under either general or special laws,

and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose or by the approval in writing, of the persons or parties holding and representing majority of such stock. A certified copy of such article of agreement, with the corporate name to be assumed by the new company, shall be filed with the Secretary of State, when the consolidation shall be considered duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction; and provided, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this Act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise. And in case any railroad in this State shall hereafter intersect any such

consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad companies shall consolidate their roads, under the provisions of this Act, they shall each file with the Secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders thereof, to be called for the purpose of considering the same.

Sec. 2. That the said chapter is hereby amended by adding thereto an additional section, to-wit: Section 52. Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise aid such company in the construction of its railroad within or without the State, for the purpose of forming a connection of the last mentioned road, with the road owned by the company furnishing such aid; *or any such railroad company which may have built its road to the boundary line of the State, may extend into the adjoining State, and for that purpose may build or buy or lease a railroad in such adjoining State and operate the same, and may own such real estate and other property in such adjoining State as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other State or of the United States, may lease or purchase all or any part of a railroad with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this State, and constructed, owned or leased by any other company if the lines of the road or roads of said companies are continuous or connected at a point either within or without this State, upon such terms as may be agreed upon between said companies, respectively; or any railroad company, duly incorporated and existing under the laws of an adjoining State of the United States may extend, construct, maintain and operate its railroad into and through this State, and for that*

purpose shall possess and exercise all the rights, powers and privileges, conferred by the general laws of this State upon railroad corporations organized thereunder and shall be subject to all the duties, liabilities and provisions of the laws of this State concerning railroad corporations as fully as if incorporated in this State; provided, that no such aid shall be furnished, nor any purchase, lease, subletting, or arrangements perfected until a meeting of the stockholders of said company or companies of this State, party or parties to such agreement, whereby a railroad in this State may be aided, purchased, leased, sub-let or affected by such arrangements shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof signed by the president and secretary of said company or companies shall have been filed in the office of the Secretary of State; and provided further, that if a railroad company of another State shall lease a railroad, the whole or a part of which is in this State, or make arrangements for operating the same as provided in this Act, or shall extend its railroad into this State, or through this State, such part of said railroad as is within this State shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this State; and a corporation in this State leasing its railroad to a corporation of another State shall remain liable as if it operated the road itself, and a corporation of another State being the lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue and be sued, in all cases and for the same causes, and in the same manner as a corporation of this State might sue or be sued, if operating its own road: but a satisfaction of any claim or judgment by either of said corporations, shall discharge the other; and a corporation of another State being the lessee as aforesaid, or extending its railroad as aforesaid into or through this State, shall establish and maintain an office or offices in this State, at some point or points on the line of the road so leased or constructed, and operated at which legal process and notice may be served, as upon railroad corporations of this State.

Sec. 3. Section twenty-two of the chapter aforesaid shall be amended to read as follows: Section 22. Any county court, city council or trustees of any town refusing to perform any of the duties required of them by this chapter, may be preceeded against by writ of mandamus, to be sued out of the circuit court of the county.

Sec. 4. Any railroad company in this State shall have the right to take and hold all necessary grounds for depots and side tracks, and if the title thereto cannot be secured by agreement with the owners thereof, or if from any other cause the title may not be secured, such company may proceed to condemn the same in the same manner and with the same effect as is now provided by chapter sixty-six of the General Statutes of the State of Missouri, entitled "Of the appropriation and valuation of lands taken for telegraph, macadamized, graded, plank and railroad purposes," and of any act amendatory thereof.

Sec. 5. Section twelve of the chapter aforesaid is hereby repealed.

Sec. 6. This Act shall take effect and be in force form and after its passage.

Approved March 24, 1870.

The Act of the General Assembly, approved March 26, 1881, amending Section 790, Revised Statutes 1879, being the same as Section 2 of the Act of March 24, 1870, entitled "An Act to amend Section seven hundred and ninety, Chapter 21, Article 2, of the Revised Statutes of Missouri, entitled 'Railroad Companies,' " is as follows:

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Section seven hundred and ninety of the Revised Statutes of the State of Missouri, is hereby amended by striking out the words "and adjoining," in the twenty-first line of said section, and inserting in lieu thereof the word "any," and such section, as so amended, shall read as follows, viz: Sec. 790. Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the State, for the pur-

pose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary of the State, may extend into the adjoining State, and for that purpose may build, buy, lease or consolidate in the manner provided in the preceding section, with any railroads in such adjoining State and operate the same, and may own such real estate and other property in such adjoining State as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other State, or of the United States, *may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this State, and constructed, owned or leased by any other company,* if the lines of the road or roads of said companies are continuous or connected at a point either within or without this State, upon such terms as may be agreed upon between said companies respectively; or any railroad company, duly incorporated and existing under the laws of *any* State of the United States, may extend, construct, maintain and operate its railroad into and through this State, and for that purpose *shall possess and exercise all the rights, powers and privileges conferred by the general laws of this State upon railroad corporation organized thereunder,* and shall be subject to all the duties, liabilities and provisions of the laws of this State concerning railroad corporations as fully as if incorporated in this State: Provided, that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected, until a meeting of the stockholders of said company or companies of this State, party or parties to such agreement, whereby a railroad in this State may be aided, purchased, leased, sub-let, consolidated or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, sixty days' public notice thereof having been previously given, and the holders of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State: And provided further, that if a railroad company of another

State shall lease a railroad, the whole or a part of which is in this State, or make arrangements for operating the same, as provided in this Act, or shall extend its railroad into this State, or through this State, such part of said railroad as is within this State, shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this State; and a corporation in this State leasing its road to a corporation of another State shall remain liable as if it operated the road itself; and a corporation of another State being the lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue and be sued, in all cases and for the same causes, and in the same manner, as a corporation of this State might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another State being the lessee as aforesaid or extending its railroad as aforesaid into or through this State, shall establish and maintain an office or offices in this State, at some point or points on the line of the road so leased, or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this State.

Approved March 26, 1881.

ACT OF APRIL 21ST, 1891.

An Act to require every foreign corporation doing business in this State to have a public office or place in this State at which to transact its business, subjecting it to certain conditions, and requiring it to file its articles or charter of incorporation with the Secretary of State, and to pay certain taxes and fees thereon.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this State, or to continue business therein if already established, shall have and maintain a public office or place in this State for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the

shall go into the revenue fund of the county in which the cause shall accrue; in addition to which penalty, on and after the going into effect to this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether arising out of contract or tort: *Provided*, that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this State; nor to "drummers" or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-resident.

Sec. 4. This act does not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to that character or corporations, but apart from the insurance laws, all acts and parts of acts inconsistent with this act are hereby repealed.

Sec. 5. The fact that there is now no law governing foreign corporation, as above provided for, creates an emergency within the intendment of the Constitution; wherefore this act shall take effect from and after its passage.

Approved April 21, 1891.

(Laws of Missouri of 1891, p. 75.)

ACT OF MARCH 13, 1907.

An Act to provide for the revoking of the license, right and authority of any foreign or non-resident railway corporation, of whatever kind, to do business from a point in this State to a point in this State, whenever such corporation shall remove certain suits or proceedings to any Federal Court, or bring certain suits or proceedings in any Federal court; to provide a penalty on any such corporation for doing, attempting to do, or holding itself out to do business as from a point in this State to a point within this State without a license, permit, or certificate of authority therefor first had and obtained, or to do such business after its license, permit or certificate of authority has been revoked, and to prevent any such corporation from doing or attempting to do business from a point in this State to a point in this State without first having obtained a license, permit or certificate of authority therefor.

Section 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other state, territory or country, and doing business as a carrier of freight or passengers from one point in this state, to another point in this state, under the laws of this state, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this state, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this State to another point in this State shall forthwith be revoked by the Secretary of State, and its right to do such business shall cease, and the Secretary of State shall publish such revocation in some newspaper of large and general circulation in the State, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this State to another point in this State or to do business as a carrier of passengers or freight of any kind from one point in this state to another point in this state at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this state to a point within this state, or from a point without this state to a point within this state, or from making what are known as interstate shipments and transportation.

Sec. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point to another in this state, without a license, permit or certificate of authority therefor, first had and obtained from the State of Missouri—to be issued by the Secretary of State—or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this state to another point in this state, shall

have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the State of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suits to be brought therefor in any court of competent jurisdiction by the attorney-general, or the prosecuting attorney of any county in the state, in which the offense shall have been committed; and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the Attorney-General or any prosecuting attorney to enforce or carry out the provisions of this act.

Sec. 3. All acts or parts of acts in conflict herewith are, insofar as they conflict, hereby repealed.

The Act was approved by the Governor on March 13, 1907, and, if valid, became effective on June 14, 1907.

(Where not otherwise indicated, the sections herein refer to Revised Statutes of 1899.)

Sec. 956. *In creation and organization, what necessary—increase of capital stock—fees to be paid.* No corporation, company or association other than those formed for benevolent, religious, scientific, fraternal, beneficial or educational purposes, shall be created or organized under the laws of this state, unless the persons named as incorporators shall, at or before the filing of the articles of association or incorporation, pay into the state treasury fifty dollars for the first fifty thousands dollars or less of the capital stock of such corporation or association, and a further sum of five dollars for every additional ten thousand dollars of its capital stock; and no increase of the capital stock of any such corporation, company or association shall be valid or effectual until such corporation company or association shall have paid into the state treasury five dollars for every ten thousand dollars or less of such increase in the capital stock of said corporation or association; and it shall be the duty of said corporation or association to file a duplicate receipt of the state treasurer for the payments herein required to be made, with the secretary of state, as is provided by this article for the filing of articles of incorporation or association. (R. S. 1889. Sec. 2493-x.)

Sec. 971, in defining corporate powers, among other things, provides as follows:

Every corporation as such has power:

First. To have succession by its corporate name for the period limited in its charter, and when no period is limited, for twenty years.

Second. To sue and be sued, complain and defend in any court of law or equity.

Sec. 972, among other things, provides as follows:

The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created or organized.

Sec. 1035, among other things, provides as follows:

Every corporation formed under this article shall, in addition to the powers hereinbefore conferred, have power:

* * * * *

Eighth. From time to time to borrow such sums of money as may be necessary for the completion, equipment or repair of their railroad, or for the funding of any floating debt, or for the making connection with any bridge, by tunnel, or otherwise; and for any or all of the purposes above named, may issue and dispose of their bonds for any amount so borrowed, and may mortgage their corporate property and franchise, or any part thereof, to secure the payment of any debt contracted by the company for the purposes aforesaid or any of them.

APPENDIX A.

MEMORANDUM FROM JOURNAL OF CONSTITUTIONAL CONVENTION.

Edmund Randolph, of Virginia, opened the main business of the Convention, stating that as the Convention had originated from Virginia and his colleagues had supposed that some proposition was excepted from them, the task had been imposed upon him. He then proceeded to dilate upon the occasion of the meeting, saying, among other things:

He observed that, in revising the Federal system we ought to inquire, first into the properties which such a government ought to possess; secondly the defects of the Confederation; thirdly the danger of our situation; and fourthly the remedy.

1. The character of such a government ought to secure, first, against foreign invasion; secondly, against dissensions between the members of the Union, or seditions in particular States; thirdly, to procure to the several States various blessings of which an isolated situation was incapable; fourthly, it should be able to defend itself against encroachment; and fifthly, to be paramount to the State Constitutions.

2. In speaking of the defects of the Confederation, he professed a high respect for its authors, and considered them as having done all that patriots could do, in the then infancy of the science of constitutions, and of confederacies; when the inefficiency of requisitions was unknown—no commercial discord had arisen among any States—no rebellion had appeared, as in Massachusetts—foreign debts had not become urgent—the havoc of paper money had not been foreseen—treaties had not been violated—and perhaps nothing better could be obtained, from the jealousy of the States with regard to their sovereignty.

He then proceeded to enumerate the defects:—First, that the Confederation produced no security against foreign invasion; Congress not being permitted to prevent a war, nor to support it by their own authority. Of this he cited many examples; most of which tended to show, that they could not cause infractions of treaties, or of the law of nations to be punished; that particular States might by their conduct provoke war without control; and that neither militia nor drafts being fit for defense on such occasions, enlistments only could be successful, and these could not be executed without money.

Secondly, that the Federal Government could not check the quarrel between the States, nor a rebellion in any, not having constitutional power nor means to impose according to the exigency.

Thirdly, that there were many disadvantages which the United States might acquire, which were not attainable under the Confederation—such as a productive impost—counteraction of the commercial regulations of other nations—pushing of commerce *ad libitum*, &c, &c.

Fourthly, that the Federal Government could not defend itself against encroachments from the States.

Fifthly, that it was not even paramount to the States Constitutions, ratified as it was in many of the States.

3. He next reviewed the danger of our situation and

appealed to the sense of the best friends of the United States—to the prospect of anarchy from the laxity of government everywhere—and to other considerations.

4. He then proceeded to the remedy; the basis of which he said must be the republican principle.

Then proceeding to the remedy, he submitted a series of resolutions, among which were the following:

Resolved, that a National Judiciary to be established, to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behavior, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the same time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, *or citizens of other States*; applying to such jurisdictions, may be interested; or which respect the collection of the national revenues; impeachments of any national officers, and questions which may involve the national peace and harmony.

Resolved, that the legislative, executive and judiciary powers, within the several States ought to be bound by oath to support the Articles of Union.

He was then followed by Charles Pinckney, who submitted the first formal draft of the Constitution. Among other things, he provided in his said draft as follows:

The Legislature of the United States shall have the power, and it shall be their duty to establish such courts of law, equity and admiralty, as shall be necessary.

The judges of the courts shall hold their offices during good behavior; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and counsels; to the trial or impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In case of im-

peachment, affecting ambassadors, and other public ministers, this jurisdiction shall be original, and in all other cases appellate.

All criminal offenses, except in cases of impeachment, shall be tried in the state where they shall be committed. The trials shall be open and public, and shall be by jury.

When the propositions of Mr. Randolph, which had been referred to a committee, were taken up, Mr. Randolph himself moved that their consideration be postponed in order to consider three certain propositions, of which the third was:

That a National Government ought to be established consisting of a supreme legislative, executive and judiciary.

On June 13th, when the Committee of the Whole arose and made report in a series of resolutions, there were among them the following:

Resolved, that a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national Legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.

Resolved, that the Legislative, Executive and Judiciary powers within the several States ought to be bound by oath to support the Articles of Union.

On July 26th, when the proceedings of the Convention of the previous week were referred to the Committee of Detail and adjournment taken August 6th in order that the Committee of Detail might have time to prepare and report the Constitution, there were among the resolutions so referred, the following:

Resolved, that the government of the United States ought to consist of a supreme Legislative, Judiciary, and Executive.

Resolved, That a National Judiciary be established, to consist of one supreme tribunal, the Judges of which shall be appointed by the second branch of the National Legislature; to hold their offices during good behavior; to receive punctually at stated times a fixed compensation for their services, in which no diminution shall be made so

as to affect the persons actually in office at the time of such diminution.

Resolved, That the National Legislature be empowered to appoint inferior tribunals.

Resolved, That the jurisdiction of the National Judiciary shall extend to cases arising under laws passed by the General Legislature; and to such other questions as involve the national peace and harmony.

Resolved, That the Legislative, Executive, Judiciary powers, within the several States, and of the National Government, ought to be bound, by oath, to support the Articles of Union.

On August 8th, when Mr. Rutledge, of South Carolina, reported for the Committee of Detail the first draft of the Constitution, there was contained therein the following:

ARTICLE II.

The government shall consist of supreme Legislative, Executive and Judicial powers.

Said formal draft also contained the following:

ARTICLE XI.

Sec. 1. The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

Sec. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states, (except such as shall regard territory or jurisdiction;) between a state and citizens of another state; *between citizens of different States*; and between a state, or the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the Legislature shall make. *The Legislature may assign any part of the jurisdiction above men-*

tioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such inferior courts, as it shall constitute from time to time.

ARTICLE XX.

The members of the Legislatures, and the Executive and Judicial officers of the United States and of the several States, shall be bound by oath to support this Constitution.

When Mr. Randolph's ninth resolution came before the Convention for consideration, the proposition that a National Judiciary be established was passed without a dissenting vote. To said resolution the following words were added: "*To consist of one supreme tribunal, and of one or more inferior tribunals.*"

Following this there was a discussion as to whether the judges should be appointed by the National Legislature, National Executive or by the Senate, the determination of which was postponed.

On September 12, when the Committee of Style reported a digest of the plan, the plan contained the following:

ARTICLE III.

Sec. 1. The Judicial power of the United States, both in law and equity, shall be vested in one Supreme Court, *and in such inferior courts as the Congress may from time to time ordain and establish.* The judges both of the supreme and inferior courts, shall hold their offices during good behavior; and shall at stated times receive for their services a compensation, which shall not be diminished, during their continuance in office.

Sec. 2. The Judicial power shall extend to all cases both in law and equity, arising under this constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority. To all cases affecting ambassadors, other public ministers and consuls. To all cases of admiralty and maritime jurisdiction. To controversies to which the United States shall be a party. To controversies between two or more states; between a state and citizens of another state; *between citizens of different states;* between citizens of the same state claiming lands

under grants of different states; and between a state, or a citizen thereof, and foreign states, citizens or subjects.

In cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

The Constitution, as signed by the members of the Convention, contained the following:

ARTICLE III.

Sec. 1. The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Sec. 2. The Judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; *between citizens of different states*; between citizens of the same state, claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Mr. Rutledge, having obtained a rule for reconsideration of the clause for establishing inferior tribunals under the national authority, now moved that that part of the clause in the ninth Resolution should be expunged; arguing that the state tribunals might and ought to be left

in all cases to decide in the first instance, the right of appeal to the Supreme National tribunal being sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction of the states, and creating unnecessary obstacles to their adoption of the new system.

Mr. Sherman seconded the motion.

Mr. Madison observed, that *unless inferior tribunals were dispersed through the Republic with final jurisdiction* in many cases, appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. *What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury?* To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar, would oblige the parties to bring up their witnesses, though ever so distant from the seat of the court. An effective judiciary establishment commensurate to the Legislative authority, was essential. A government without a proper Executive and Judiciary, would be the mere trunk of a body, without arms or legs to act or move.

Mr. Wilson opposed the motion on like grounds. He said the admiralty jurisdiction ought to be given wholly to the National Government, as it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen.

Mr. Sherman was in favor of the motion. He dwelt chiefly upon the supposed expensiveness of having a new set of courts, when the existing state courts would answer the same purpose.

Mr. Dickinson contended strongly, that *if there was to be a National Legislature, there ought to be National Judiciary*, and that the former ought to have authority to institute the latter.

On the question for Mr. Rutledge's motion to strike out "inferior tribunals," it passed in the affirmative—Connecticut, New York, New Jersey, North Carolina, South Carolina, Georgia, aye—8; Pennsylvania, Delaware, Maryland, Virginia, no—4; Massachusetts, divided.

Mr. Wilson and Mr. Madison then moved, in pursuance of the idea expressed above by Mr. Dickinson, to add to the ninth Resolution the words following: "*That the National Legislature be empowered to institute inferior tri-*

baals." They observed, that there was a distinction between establishing such tribunals absolutely, and giving discretion to the Legislature to establish or not to establish them. They repeated the necessity of some such provision.

Mr. Butler: The people will not bear such innovations. The states will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. we must follow the example of Solon, who gave the Athenians not the best government he could devise, but the best they would receive.

Mr. King remarked, as to the comparative expense, that the establishment of inferior tribunals, would cost infinitely less than the appeals that would be prevented by them.

On this question, as moved by Mr. Wilson and Mr. Madison, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, aye—8; Connecticut, South Carolina, no—2; New York, divided.

All that happened before this in the adoption is to be found on pages 107 to 110, Madison's Journal.

It was then moved and seconded to proceed to the consideration of the ninth Resolution submitted by Mr. Randolph; when, on motion to agree to the first clause, namely, "Resolved, that a National Judiciary be established," it passed in the affirmative, nem. con.

It was then moved and seconded to add these words to the first clause of the ninth Resolution, namely, "to consist of one supreme tribunal and of one or more inferior tribunals," which passed in the affirmative.

The Committee then rose, and the House adjourned.

THURSDAY, JUNE 5TH.

Governor Livingston, of New Jersey, took his seat.

In the Committee of the Whole; the words "one or more" were struck out before "inferior tribunals" as an amendment to the last clause of the ninth Resolution. The clause, "that the National Judiciary be chosen by the National Legislature," being under consideration.

Mr. Wilson opposed the appointment of Judges by the National Legislature. Experience showed the impropriety of such appointments by numerous bodies. Intrigue, partiality and concealment were the necessary consequences. A principal reason for unity in the Executive, was, that

Resolved, that a Federal Judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the Executive, and to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of Federal officers; and by way of appeal, in the dernier resort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of Federal revenue; that none of the Judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for.....thereafter.

In Pinckney's plan, or draft, of the Federal Government it was proposed at the outset and in the enumeration of the powers of Congress, or, as he called it, "the Legislature of the United States," "*to constitute tribunals inferior to the Supreme Court.*" (See Article VI, page 268, Madison's Journal of the Constitutional Convention.)

The eleventh resolution, "that a national Judiciary shall be established to consist of one supreme tribunal," agreed to nem. con.

On the clause, "the judges of which to be appointed by the second branch of the National Legislature,"—

Mr. Gorham would prefer an appointment by the second branch to an appointment by the whole Legislature; but he thought even that branch too numerous, and too little personally responsible, to ensure a good choice. He suggested that the Judges be appointed by the Executive with the advice and consent of the second branch, in the mode prescribed by the Constitution of Massachusetts. This mode had been long practiced in that country; and was found to answer perfectly well.

Mr. Wilson would still prefer for an appointment by the Executive; but if that could not be attained, would

prefer, in the next place, the mode suggested by Mr. Gorham. He thought it his duty, however, to move in the first instance, "that the judges be appointed by the Executive."

Mr. Gouveneur Morris seconded the motion.

Mr. L. Martin was strenuous for an appointment by the second branch. Being taken from all the states, it would be best informed of characters, and most capable of making a fit choice.

Mr. Sherman concurred in the observations of Mr. Martin, adding that the Judges ought to be diffused, which would be more likely to be attended to by the second branch, than by the Executive.

Mr. Mason: The mode of appointing the Judges may depend in some degree on the mode of trying impeachments of the Executive. If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive. There were insuperable objections besides against referring the appointment to the Executive. He mentioned, as one, that as the seat of government must be in some one state; and as the Executive would remain in office for a considerable time, for four, five or six years at least, he would insensibly form local and personal attachments within the particular state, that would deprive equal merit elsewhere of an equal chance of promotion.

Mr. Gorham: As the executive will be responsible, in point of character at least, for the judicious and faithful discharge of his trust, he will be careful to look through all the states for proper characters. The senators will be as likely to form their attachments at the seat of government where they reside, as the Executive. If they cannot get the man of the particular state to which they respectively belong, they will be indifferent to the rest. Public bodies feel no personal responsibility, and give full play to intrigues and cabal. Rhode Island is a full illustration of the insensibility to character produced by a participation of numbers in dishonorable measures, and of the length to which a public body may carry wickedness and cabal.

Mr. Gouveneur Morris supposed it would be improper for an impeachment of the Executive to be tried before the Judges. The latter would in such case be drawn into intrigue with the Legislature, and an impartial trial would be frustrated. As they would be much about the seat of government, they might even be previously consulted, and

arrangements might be made for the prosecution of the Executive. He thought, therefore, that no argument could be drawn from the probability of such a plan of impeachment against the motion before the House.

Mr. Madison suggested that the Judges might be appointed by the Executive, with the concurrence of one-third at least of the second branch. This would untie the advantage of responsibility in the Executive, with the security afforded in the second branch against any incautious or corrupt nominations by the Executive.

Mr. Sherman was clearly for an election by the senate. It would be composed of men nearly equal to the Executive, and would, of course, have on the whole more wisdom. They would bring into their deliberations a more diffusive knowledge of characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate. For these reasons he thought there would be a better security for a proper choice in the Senate, than in the Executive.

Mr. Randolph: It is true that when the appointment of the Judges was vested in the second branch in equality of votes had not been given to it. Yet he had rather leave the appointment there than to give it to the Executive. He thought the advantage of personal responsibility might be gained in the Senate, by requiring the respective votes of the members to be entered on the journal. He thought, too, that the hope of receiving appointments would be more diffusive, if they depended on the Senate, the members of which would be diffusively known, than if they depended on a single man, who could not be personally known to a very great extent; and consequently, that opposition to the system would be so far weakened.

Mr. Bedford thought there were splendid reasons against leaving the appointment to the Executive. He must trust more to information than the Senate. It would put it in his power to gain over the larger states by gratifying them with a preference of their citizens. The responsibility of the Executive so much talked of, was chimerical. He could not be punished for mistakes.

Mr. Gorham remarked, that the Senate could have no better information than the Executive. They must, like him, trust to information from the members belonging to the particular state where the candidates resided. The

Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone. He did not mean that he would be answerable under any other penalty than that of public censure, which with honorable minds was a sufficient one.

On the question for referring the appointment of the Judges to the Executive, instead of the second branch—Massachusetts, Pennsylvania, aye—2; Connecticut, Delaware, Maryland, Virginia, North Carolina, South Carolina, no—6; Georgia, absent.

Mr. Gorham moved, "That the Judges be nominated and appointed by the Executive, by and with the advice and consent of the second branch, and every such nomination shall be made at least——days prior to such appointment." This mode, he said, had been ratified by the experience of a hundred and forty years in Massachusetts. If the appointment should be left to either branch of the Legislature, it will be a mere piece of jobbing.

Mr. Gouverneur Morris seconded and supported the motion.

Mr. Sherman thought it less objectionable than an absolute appointment by the Executive; but disliked it, as too much fettering the senate.

On the question of Mr. Gorham's motion, Massachusetts, Pennsylvania, Maryland, Virginia, aye—4; Connecticut, Delaware, North Carolina, South Carolina, no—4; Georgia, absent.

Mr. Mardison moved; "that the Judges should be nominated by the Executive, and such nomination should become an appointment if not disagreed to within——days by two-thirds of the second branch."

Mr. Gouverneur Morris seconded the motion.

By common consent the consideration of it was postponed till to-morrow.

"To hold their office during good behavior, and to receive fixed salaries," agreed to, *nem. con.*

"In which (salaries of Judges) no increase or diminution should be made so as to affect the persons actually in office at the time."

Mr. Gouverneur Morris moved to strike out "or increase." He thought the Legislature ought to be at liberty to increase salaries, as circumstances might require; and that this would not create any improper dependence in the Judges.

Dr. Franklin was in favor of the motion. Money may not only become plentier, but the business of the department may increase, as the country becomes more populous.

Mr. Madison: The dependence will be less if the increase alone should be permitted; but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the Legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in course suits with which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered, if it can be prevented. The variations in the value of money may be guarded against by taking for a standard wheat, or some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may be easily so contrived as not to affect persons in office.

Mr. Gouverneur Morris: The value of money may not only alter, but the state of society may alter. In this event, the same quantity of wheat, the same value, would not be the same compensation. The amount of salaries must always be regulated by the manners and style of living in a country. The increase of business cannot be provided for in these supreme tribunals in the way that has been mentioned. All the business of a certain description, whether more or less, must be done in that single tribunal. Additional labor alone in the Judges can provide for additional business. Additional compensation, therefore, ought not to be prohibited.

On the question for striking out "or increase" Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, South Carolina, aye—6; Virginia, North Carolina, no—2; Georgia, absent.

The whole clause, as amended, was then agreed to *nem. con.*

Resolved, that the Legislative, Executive and Judiciary powers, within the several states, and of the National Government, ought to be bound, by oath, to support the Articles of Union.

This being among the resolutions referred to the Committee on Detail on July 26th.

On page 458, from the report of the Committee of Detail in Article VII, appears the following:

Sec. 1. The Legislature of the United States shall have the power to levy and collect taxes, duties, imposts and excises. * * * *To constitute tribunals inferior to the Supreme Court.*

When the report of the Committee of Detail was reported on August 6th, it contained in Article XII certain provisions above quoted. When the Committee of Style and Arrangements made report, on September 12, there was contained in Article I. Section 8, enumerating the powers of Congress, the following: "*To constitute tribunals inferior to the Supreme Court.*" The same thing appears in the copies signed by members, Section 8, Article I, enumerating the powers of Congress.

APPENDIX B.

QUOTATIONS FROM "THE FEDERALIST."

To judge with accuracy of the due extent of the Federal judicature, it will be necessary to consider, in the first place, what are its proper objects. It seems scarcely to admit of controversy, that the judiciary authorities of the Union ought to extend to those several descriptions of cases; 1st. To all those which arise out of the laws of the United States, passed in pursuance of their judicial and constitutional powers of legislation; 2nd. To all those which concern the execution of the provisions expressly contained in the Articles of the Union. * * * And lastly, to all those in which the state tribunals cannot be supposed to be impartial and unbiased.

Speaking of the second point above, the writer further continued:

As to the second point, it is impossible by any argument or comment to make it clearer than it is in itself. If there are such things as political axioms, the priority of the judicial power of the government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. *Thirteen independent courts of final jurisdiction over the same causes arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.*

Further continuing, the writer says:

The power of determining cases between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian at the close of the 15th century; and informs us, at the same time, of the vast influence of that institution in appeasing and establishing the tranquility of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

Continuing, the author of paper number 80, in speaking of the Federal Judiciary proposed to be created by the Constitution, said:

From this view of the particular powers of the Federal Judiciary as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such legislation as will be calculated to obviate or remove these inconveniences. The possibility of peculiar mischiefs can never be viewed by any well informed mind as a solid objection to a principle which is calculated to avoid general mischief and to obtain general advantages. (See No. 80, *The Federalist*.)

Speaking of the Constitution of inferior Federal Tribunals, the writer, in paper number 81, of "*The Federalist*," says:

The power of constituting inferior courts, is evidently calculated to obviate the necessity of having recourse to the supreme court in every case of federal cognizance. It is intended to enable the national government to institute or *authorise*, in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have

been accomplished by the instrumentality of the state courts? This admits of different answers. Though the fitness and competency of these courts should be allowed in the utmost latitude; yet the substance of the power in question may still be required as a necessary part of the plan if it were only to authorize the national legislature to commit to them the cognizance of causes arising out of the national constitution. To confer upon the existing courts of the several states the power of determining such causes would perhaps be as much "to constitute tribunals," as to create new courts with a like power. But ought not a more direct and explicit provision to have been made in favor of the state courts? There are, in my opinion, substantial reasons against such a provision; *the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes*; whilst every man may discover that courts constituted like those of some of the states would be improper channels of the judicial authority of the Union. State judges holding their offices during pleasure, or from year to year, will be too little independent to be relied upon an inflexible execution of the national law. And if there was a necessity for confiding to them the original cognizance of causes arising under those laws, there would be a corresponding necessity for leaving the door of appeal as wide open as possible. In proportion to the grounds of confidence in, or distrust of the subordinate tribunals, ought to be the facility or difficulty of appeals.

I am not sure but that it will be found highly expedient and useful to divide the United States into four, or five, or half a dozen districts; and to constitute a Federal court in each district in lieu of one in every state. The judges of these courts may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and despatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to be at present the most eligible of any that could be adopted; and in order to do it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is seen in the proposed constitution. (See No. 81, "The Federalist.")

Under a further review of the judicial department the following is found in The Federalist:

The only thing in the proposed constitution which wears the appearance of confining the causes of federal cognizance to the federal court, is contained in this passage. "The judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress shall from time to time ordain and establish." This might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those cases to which their authority is to extend; or simply to denote that the organs of the national judiciary should be one supreme court, and as many subordinate courts as Congress should think proper to appoint; in other words that the United States should exercise the judicial power with which they are to be invested through one supreme court, and a certain number of inferior ones to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals, and as the first would amount to alienation of state power by implication, the last appears to be the most defensible construction.

But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance. It is not equally evident in relation to cases which grow out of, and be *peculiar* to the constitution to be established; for not to allow the state courts any right of jurisdiction in such cases can hardly be considered as the abridgement of a pre-existing authority. I mean not therefore to contend, that the United States, in the course of legislation upon the objection entrusted to their direction may not permit the decision of causes arising upon the particular legislation to the Federal court solely, if such a manner should be deemed expedient; but to hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of the opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of the judiciary power, and from the general genius of the system. * * * When, in addition to this, we consider the state governments and the national governments as they truly are, in the light of kindred systems, and as parts of one whole, the inference

seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it is not expressly prohibited.

Continuing further in the same paper, the writer says :

Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will, of course, be naturally auxiliaries to the execution of the laws of the Union, and an appeal from them will lie to that tribunal which is destined to *unite and assimilate the principles of national justice and the rules of national decision*. The evident aim of the plan of the convention is that all of the causes of the specified clauses, *for weighty public reasons*, receive their original or final determination in the courts of the Union.

The plan of the convention, in the first place, authorizes the national legislature to constitute tribunals inferior to the supreme court. * * * It declares in the next place that "The Judicial power of the United States shall be vested in one supreme court and in such inferior courts as Congress shall ordain and establish," and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of the subordinate courts. The only outlines described for them are that they shall be "inferior to the Supreme Court," and that they shall not exceed the specified limits of the Federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. (See No. 82, "The Federalist.")